FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Wilson (No 3)

[2023] FCA 1009

File number:	WAD 259 of 2018
Judgment of:	**JACKSON J**
Date of judgment:	28 August 2023
Catchwords:	**CORPORATIONS** - directors' duties - duty of care and diligence - s 180(1) of the *Corporations Act 2001* (Cth) - alleged failure by managing director to tell board of termination of material agreements - consideration of hypothetical reasonable director - finding that managing director knew of possibility of termination - finding that hypothetical reasonable director would not have informed board of impending termination - factual foundation of case that managing director knew of actual termination not made out - no breaches of duty of care and diligence established **CORPORATIONS** - continuous disclosure obligations - s 180(1) and s 674 of the *Corporations Act* - exposure of company by managing director to risk of adverse consequences - consideration of breach of director's duty of care and diligence in said exposure - no allegation that company did breach s 674 of the *Corporations Act* - board lost opportunity to make disclosures about termination of material agreements - hypothetical reasonable director would have brought termination of material agreements to board's attention, if known - no such knowledge held by managing director - factual foundation of managing director receiving copy of termination agreement not made out - no breaches of duty of care and diligence established **CORPORATIONS** - misleading and deceptive conduct in relation to a financial product - s 180(1) and s 1041H of the *Corporations Act* - alleged failure by managing director to ensure company did not mislead market - announcement 'potentially' misled market as to ongoing supply to former customer - risk of exposure of company to breach of continuous disclosure obligations - hypothetical reasonable director would have prevented issue of misleading announcement - allegation that managing director knew of termination of ongoing supply agreement not made out - no breaches of duty of care and diligence established

CORPORATIONS - alternative plea - s 180(1) of the *Corporations Act* - whether managing director should have enquired as to status of material agreements before approving market announcement - hypothetical reasonable director would not have made such enquiries

EVIDENCE - standard of proof - where main witness called by each party unsatisfactory - use of objective factual surrounding material, inherent commercial probabilities and documentary evidence - drawing of inferences from available evidence

EVIDENCE - expert evidence - objections to admissibility of expert report - whether witness has necessary specialised knowledge - whether opinion based on specialised knowledge - objections overruled

Legislation:

Australian Securities and Investments Commission Act 2001 (Cth)

Corporations Act 2001 (Cth) ss 180, 674, 677, 1041H, 1317E, 1317G, Part 5.3A

Evidence Act 1995 (Cth) ss 76, 79 140

Cases cited:

Arcus Shopfitters Pty Ltd v Western Australian Planning Commission [2002] WASC 174

Asden Developments Pty Ltd (in liq) v Dinoris [2017] FCAFC 117

Australian Broadcasting Corporation v Chau Chak Wing [2019] FCAFC 125; (2019) 271 FCR 632

Australian Competition and Consumer Commission v SMS Global Pty Ltd [2011] FCA 855

Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2020] FCAFC 130; (2020) 278 FCR 450

Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54; (2013) 250 CLR 540

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

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

Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5) [2009] FCA 1586

Australian Securities and Investments Commission v GetSwift Ltd [2021] FCA 1384

Australian Securities and Investments Commission v Helou (No 2) [2020] FCA 1650

Australian Securities and Investments Commission v King [2020] HCA 4; (2020) 270 CLR 1

Australian Securities and Investments Commission v Lindberg [2012] VSC 332

Australian Securities and Investments Commission v Mariner Corporation Limited [2015] FCA 589; (2015) 241 FCR 502

Australian Securities and Investments Commission v Maxwell [2006] NSWSC 1052

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

Australian Securities and Investments Commission v Vocation Limited (In Liquidation) [2019] FCA 807

Australian Securities and Investments Commission v Wilson [2020] FCA 873

Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1

Briginshaw v Briginshaw (1938) 60 CLR 336

Cassimatis v Australian Securities and Investments Commission [2020] FCAFC 52; (2020) 275 FCR 533

Chant v Curcuruto [2021] NSWSC 751

Daniels (formerly practising as Deloitte Haskins & Sells) v Anderson (1995) 37 NSWLR 438

Davie v Lord Provost, Magistrates and Councillors of the City of Edinburgh [1953] SC 34

Earglow Pty Ltd v Newcrest Mining Ltd [2015] FCA 328; (2015) 230 FCR 469

Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd [1999] HCA 15

Grant-Taylor v Babcock & Brown Limited (In Liquidation) [2015] FCA 149

Grant-Taylor v Babcock & Brown Limited (in liquidation) [2016] FCAFC 60; (2016) 245 FCR 402

HG v The Queen [1999] HCA 2; (1999) 197 CLR 414

James Hardie Industries NV v Australian Securities and Investments Commission [2010] NSWCA 332

Jones v Dunkel (1959) 101 CLR 298

Jubilee Mines v Riley [2009] WASCA 62; (2009) 40 WAR 299

Krolczyk v Winner [2022] NSWCA 196

Kuligowski v Metrobus [2004] HCA 34; (2004) 220 CLR 363

Makita (Aust) Pty Ltd v Sprowles [2001] NSWCA 305; (2001) 52 NSWLR 705

National Australia Bank v Pathway Investments [2012] VSCA 168

Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449

New South Wales v Fahy [2007] HCA 20; (2007) 232 CLR 486

Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd [2000] FCA 1463; (2000) 120 FCR 146

O'Connor v O'Connor [2022] NSWCA 97

Palmer v Dolman [2005] NSWCA 361

Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191

Pownall v Conlan Management Pty Ltd (1995) 12 WAR 370

Ramsay v Watson (1961) 108 CLR 642

Rhesa Shipping Co SA v Edmunds (The Popi M) [1985] 2 All ER 712

Roberts-Smith v Fairfax Media Publications Pty Limited (No 41) [2023] FCA 555

Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co [1901] AC 373

Shafron v Australian Securities and Investments Commission [2012] HCA 18; (2012) 247 CLR 465

Spencer v Commonwealth (1907) 5 CLR 418

Steffen v Ruban (1966) 84 WN (Pt 1) (NSW) 264; [1966] 2 NSWR 622

Vines v Australian Securities and Investments Commission [2007] NSWCA 75; (2007) 73 NSWLR 451

Vrisakis v Australian Securities Commission (1993) 9 WAR 395

Wyong Shire Council v Shirt (1980) 146 CLR 40

Division:	General Division
Registry:	Western Australia
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	752
Date of hearing:	30-31 August, 1-3, 6-7, 13, 20-23 September and 20 October 2021
Counsel for the Plaintiff:	Mr MD Howard SC with Mr S Wong and Ms P Honey
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the Defendant:	Mr GR Donaldson SC with Mr T Russell and Mr J Sippe
Solicitor for the Defendant:	Mizen + Mizen

ORDERS

WAD 259 of 2018

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**FRANK CULLITY WILSON** Defendant

ORDER MADE BY: **JACKSON J**

DATE OF ORDER: **28 AUGUST 2023**

THE COURT ORDERS THAT:

1. By 4.00 pm on Monday, 4 September 2023 the parties must submit a consent minute concerning the disposal or further conduct of the proceeding (including as to costs), or if necessary, competing minutes.
2. Today's hearing is adjourned to 2.15 pm AWST on Wednesday, 6 September 2023.

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

Table of Contents

REASONS FOR JUDGMENT

JACKSON J:

1 The plaintiff (**ASIC**) claims that the respondent, Frank Cullity Wilson, contravened s 180(1) of the *Corporations Act 2001* (Cth), which imposes statutory obligations of care and diligence on directors and other officers of corporations. ASIC alleges that Mr Wilson breached those obligations when he was Managing Director of a then publicly listed company, Quintis Limited (now called ACN 092 200 854 Ltd) (**Quintis**). In broad terms, ASIC claims that Mr Wilson failed to tell the board of directors of Quintis (**Board**) that certain material agreements were going to be terminated, and then that they had been terminated. ASIC also alleges that Mr Wilson failed to ensure that Quintis did not mislead the market about the termination of the agreements. These alleged failures are said to have exposed Quintis to various adverse consequences, including a risk of breaching continuous disclosure requirements. ASIC alleges that in this way, Mr Wilson failed to exercise his powers and discharge his duties with the requisite degree of care.

2 ASIC seeks declarations that Mr Wilson contravened s 180(1), a pecuniary penalty order in respect of all but one of the alleged contraventions, and an order disqualifying Mr Wilson from managing corporations for a period that the court considers appropriate. Mr Wilson defends the proceeding, and denies that he has breached the *Corporations Act* and denies that ASIC is entitled to any relief.

3 The question of whether Mr Wilson did breach s 180(1) was tried in August, September and October 2021 over 13 days. Also part of that trial was a question that must be answered in the affirmative if the Court is to have power to impose civil penalties: whether any breaches materially prejudiced the interests of Quintis or its members, or were serious, for the purposes of s 1317G of the *Corporations Act.* But due to an order for a separate question made on 29 October 2020 the question of what penalties or disqualification orders, if any, should be imposed were not part of that trial.

4 In any event, for the following reasons, I have determined that ASIC has not made out any of the contraventions of s 180 alleged against Mr Wilson.

I. BACKGROUND

5 It is helpful to describe the facts that are relatively uncontentious, in order to provide a framework for the many issues that are contentious.

6 Quintis listed on the Australian Securities Exchange (**ASX**) on 21 December 2004 and remained listed until it was suspended from official quotation on 17 May 2017. For almost all of that time, it was called TFS Corporation Limited. Its name changed to Quintis Limited on 22 March 2017. In what follows I will refer to it as Quintis, but I will not amend references to it in quotations from the evidence or submissions, where 'TFS' or 'Quintis' may be used interchangeably.

7 Quintis was engaged in the business of the cultivation, sale, distribution, management and ownership of plantations of sandalwood trees. Many of those trees were owned by investors through investment schemes which Quintis managed, and from which it earned management and performance fees. But Quintis also managed and operated its own plantations (through subsidiaries) and extracted sandalwood oil from wood that it harvested. Quintis derived part of its income from the sale of pharmaceutical grade East Indian sandalwood oil (**EISO**).

8 Mr Wilson was a director of Quintis between 2000 and 2011 and then from 2012 until his resignation on 27 March 2017. He was Executive Chairman from December 2006 to November 2011 and Managing Director from at least September 2015 until 27 March 2017. He was also Quintis's largest shareholder, through his family trust, which during the period material to this proceeding held approximately 13.5% of the issued ordinary shares in the company. Mr Wilson also held over a million Quintis performance rights during the relevant period.

9 Throughout the period relevant to this claim, the Non-Executive Chairman of the Board of Quintis was Dalton Gooding. Other Board members were Julius Matthys, Giovanni (John) Groppoli, Gillian Franklin and Michael Kay. Alistair Stevens was the Chief Financial Officer (**CFO**). Each of those people gave evidence at the trial.

10 The material agreements I have mentioned were between two American companies that became subsidiaries of Quintis, and **Galderma** SA, a global dermatology company which is wholly owned by Nestlé. The Quintis subsidiaries were based in Texas; one was called Santalis Pharmaceuticals Inc (**Santalis**) and the other, ViroXis Corporation (later renamed Santalis Healthcare Corporation) (**ViroXis**).

11 ViroXis was founded by Paul Castella and his business partner Ian Clements in 2006, originally to commercialise a particular pharmaceutical use of sandalwood oil. Dr Castella was the Chief Executive Officer (**CEO**) of ViroXis. Santalis was formed in 2010 as a 50/50 joint venture between Quintis and ViroXis for the purpose of commercialising other pharmaceutical and healthcare applications for sandalwood oil.

12 In December 2011, each of Santalis and ViroXis entered into licence and supply agreements with Galderma. There were further iterations of those agreements, the last of which were each styled 'Definitive Supply Agreement' and dated 20 February 2014 (**Galderma Agreements**). Each of the Galderma Agreements was effectively backed by a further agreement under which Quintis would supply EISO to Santalis or ViroXis for on-supply to Galderma. It was contemplated that Galderma would use the EISO in products with prescription (**Rx**) or over the counter (**OTC**) pharmaceutical applications, in particular for the treatment of acne.

13 Towards the end of 2014, Galderma launched a product range branded 'Benzac Acne Solutions'. EISO obtained under the Galderma Agreements was an ingredient in the products. It is not in dispute that Quintis referred to the Galderma Agreements and the Benzac product range in numerous releases to the ASX between February 2014 and February 2017, although the significance of those references is in dispute.

14 On 16 December 2016, Galderma entered into an agreement with Santalis and ViroXis terminating the Galderma Agreements, with effect as of 1 January 2017 (albeit with an option until 1 July 2017 for Galderma to reinstate the agreements) (**Termination Agreement**).

15 On 22 March 2017, Glaucus Research Group California LLC (**Glaucus**), a self-described short seller, published a report that was highly critical of Quintis (**Glaucus Report**). That appears to have led to a drop in Quintis's share price which prompted the ASX to ask Quintis, among other things, whether it was aware of any information concerning it that had not been announced to the market which, if known by some in the market, could explain the recent trading in its shares. Quintis responded referring to the Glaucus Report and its response led to a further query from the ASX dated 24 March 2017 asking, among other things, for the names and any material information about buyers who had been referred to in previous Quintis announcements.

16 On 27 March 2017, Quintis gave a response to the ASX which included a list that was said to be of 'customers Quintis has supplied wood or oil to under multi-year contracts' (**27 March**

Response). Details referable to the Galderma Agreements were included in the list, including a price of US$4,500 per kg and a term of 20 years starting in 2014. On the same day, Mr Wilson resigned as a director and Managing Director.

17 On 9 May 2017, a journalist from the Australian Financial Review called FTI Consulting, a firm managing Quintis's corporate communications, to say that Nestlé had told her they had 'cancelled' the Galderma Agreements. On 10 May 2017, before the market opened, Quintis made an announcement to the ASX which disclosed the termination of those agreements as having taken place on 16 December 2016. Its shares had closed the evening before the announcement at AU$1.07. When the market opened they were quoted at AU$0.85. By the close for the day they were at AU$0.60.

18 On 6 June 2017, Quintis made an announcement to the ASX which included a statement to the effect that it would need to write off an intangible asset of AU$7.9 million relating to the Galderma Agreements which had formed part of a larger balance for intangible assets and goodwill that had been in the company's half year results as at 31 December 2016.

19 In September and November of 2017, representative proceedings were commenced against Quintis in this court (NSD 1568 of 2017 and NSD 1983 of 2017) alleging that the company contravened s 674 of the *Corporations Act*, which imposes continuous disclosure obligations on listed companies.

20 The Board appointed administrators to Quintis under Part 5.3A of the *Corporations Act* on 20 January 2018 and receivers and managers were appointed on 23 January 2018.

II. THE ISSUES

The pleadings and particulars

21 The case that ASIC makes within that framework of uncontentious facts was ultimately pleaded in a Fourth Further Amended Statement of Claim filed on 17 September 2021 (**SOC**). Mr Wilson initially filed a defence in which he admitted a few uncontentious introductory allegations and relied on the privilege against exposure to penalties so as to avoid pleading to anything else. Pursuant to his claim of privilege, he did not put on any written evidence or notice of evidence before trial. But after ASIC closed its case at trial, Mr Wilson elected to go into evidence and, in accordance with the directions of the court, on 15 September 2021 filed a substituted defence (**Defence**). The issues that arise from the SOC and the Defence are as follows.

Mr Wilson's duties and responsibilities

22 The SOC sets out certain matters which ASIC says were among Mr Wilson's duties and responsibilities as Managing Director of Quintis. In broad terms these pertain to keeping the Board informed, monitoring matters affecting Santalis's commercial position, prospects and performance and informing the Board of those things, approving public statements and ensuring that they are not misleading, and ensuring that Quintis complies with its disclosure obligations under the *Corporations Act* and the ASX Listing Rules. Mr Wilson does not admit these duties. Particulars of the bases on which these duties are said to have arisen were provided. ASIC relies on:

(a) the fact that Mr Wilson was a senior executive officer within Quintis;

(b) his skills and experience as a director of an ASX listed company, as a businessman and, before that, as managing partner of a law firm specialising in taxation, property and commercial law (these are also pleaded in the SOC but not admitted);

(c) the monthly written reports to the Board which Mr Wilson gave (providing a basis for the monitoring and reporting duties pleaded);

(d) the fact that Mr Wilson was one of only two people who were directors of both Quintis and Santalis, and as Managing Director of Quintis received reports directly from Dr Castella as CEO of Santalis (also providing a basis for the monitoring and reporting duties);

(e) the fact that Mr Wilson had been represented in, at least, Quintis's 2016 Annual Report as being among the company's 'Key Management Personnel' (also providing a basis for the monitoring and reporting duties);

(f) the fact that Mr Wilson effectively owned approximately 13.5% of the shares in Quintis (providing, for reasons that are not explained, a basis for the duty of selecting matters to be brought to the attention of the Board and of informing the Board of matters affecting the company's commercial position, prospects and performance); and

(g) the fact that Mr Wilson signed and authorised and approved ASX market announcements (providing a basis for the duties pleaded in relation to market disclosure).

23 The SOC then effectively pleads that Mr Wilson was subject to the obligations of care and diligence in s 180(1) of the *Corporations Act*. Mr Wilson admits this in so far as it applies to his powers and duties as a director of Quintis.

The Galderma Agreements and Benzac

24 After setting out the relevant terms of the Galderma Agreements, and the fact that Galderma launched the Benzac range in November or December 2014, both of which are largely admitted, the SOC alleges that from 26 February 2014 to 27 March 2017, Quintis made 84 announcements to the ASX which referred to the Galderma Agreements and/or Benzac. Quintis also referred to those things in its annual reports and financial statements for FYE 2014, 2015 and 2016 (this judgment will use the convention 'FYE' to designate financial year ending on 30 June in the relevant year). ASIC alleges that by those various public references, 'Quintis represented to the market that the Galderma Agreements were significant agreements for Quintis and to the long-term value of its business' (SOC para 14B). Mr Wilson does not admit any of these allegations. ASIC has also provided further particulars of the announcements and what they are said to have conveyed. The particulars include a detailed schedule giving particulars of each of the 84 announcements and the passages in them that mentioned Galderma.

25 As to the making of the announcements, and whether they referred to the Galderma Agreements and/or Benzac, I understand Mr Wilson to be putting ASIC to proof. The announcements and reports are matters of public record and, as will be seen, there were frequent references in them to the Galderma Agreements and/or Benzac. But what exactly was conveyed by those public statements, and what significance the asserted representations about Galderma had, were more contentious issues at trial. Mr Wilson's case was based, in part, on the contention that by the time of the termination of the Galderma Agreements in December 2016, and also by the time of the ASX announcement of late March 2017, the Galderma Agreements were not material to Quintis, particularly in light of the fact that no oil sales had been made under the agreements since June 2015. In other words, according to Mr Wilson, whatever the ASX announcements may have said, the reality was that the Galderma Agreements were not very important to Quintis by at least the end of 2016.

The termination of the Galderma Agreements and Mr Wilson's knowledge

26 The SOC goes on to allege that by no later than July 2016, Mr Wilson knew that there was a real possibility that Galderma would seek to end the Galderma Agreements. This goes, not to ASIC's primary case as to breaches of s 180, which I will soon describe, but to an alternative case. That alternative, ASIC contends, leads to the conclusion that Mr Wilson breached the

section even if it is not established that he knew that the Galderma Agreements had been terminated.

27 The plea of knowledge in support of the alternative case is particularised by reference to several email chains involving Mr Wilson and reports to the Board that were sent over the course of July to September 2016. In the Defence, Mr Wilson says that by July 2016 he understood that there was a possibility that Galderma would seek to end the distribution of Benzac. He pleads that this understanding was shared by all other directors of Quintis, and otherwise denies the allegation as to his knowledge.

28 Then, the SOC alleges that on 28 November 2016, Galderma told Santalis that it wanted to terminate the Galderma Agreements. This is said to have occurred in a telephone conversation between Dr Castella and Scott McCrea (a senior executive of Galderma) on that day, and to have been followed by an email from Mr McCrea to Dr Castella on 1 December 2016. Mr Wilson does not admit this in the Defence, but did not contest it at trial.

29 What was more contentious was whether, as ASIC pleads, from early December 2016 Mr Wilson knew that Galderma wanted to terminate the Galderma Agreements and was taking steps to do so. Dr Castella is said to have informed Mr Wilson of this in a series of telephone conversations in early to mid-December which are particularised in a schedule to the SOC. The particulars also refer to an email from Dr Castella to Mr Wilson dated 5 December 2016 although, as will be seen, that email only alludes to the issue obliquely, if at all. Mr Wilson simply denies that from early December 2016, he knew that Galderma wanted and were taking steps to terminate the Galderma Agreements.

The first alleged breach of s 180

30 ASIC then pleads that a reasonable director of a corporation in Quintis's circumstances and who occupied the office of Mr Wilson, and had the same responsibilities and knowledge as Mr Wilson, acting with care and diligence as required by s 180(1) of the *Corporations Act* (whom I will call the **hypothetical reasonable director**) would have (SOC para 16A):

> a. recognised that the Board would need to:
>
> i. be kept informed of any steps taken by Galderma to terminate the Galderma Agreements;
>
> ii. consider what steps Quintis should take at that point in time, including what steps it might be able to take to avoid a termination of the Galderma Agreements; and

b. taken all necessary steps to ensure that the Board was promptly informed that Galderma wanted and was taking steps to terminate the Galderma [A]greements.

31 In this regard, ASIC expressly relies on Mr Wilson's alleged knowledge of the ASX announcements made between February 2014 and March 2017, of the annual reports and financial statements, and of Galderma's desire and steps to terminate the Galderma Agreements. Mr Wilson's plea to this is to refer to his previous responses to those allegations and to otherwise deny that the hypothetical reasonable director would have recognised the matters and taken the steps that ASIC pleads.

32 The SOC alleges that Mr Wilson failed to inform the Board in early December or at all that Galderma wanted to terminate the Galderma Agreements and was taking steps to do so. Once again, Mr Wilson refers to his previous pleas to the allegations of his knowledge, and to otherwise deny that he failed to inform the Board. ASIC alleges that by reason of the alleged failure to inform, the Board lost the opportunity to take the steps mentioned in the paragraph quoted above. Mr Wilson denies this.

33 Thus is placed in issue the first alleged breach of s 180(1), which is said to have taken place before the Galderma Agreements were actually terminated. ASIC does not, however, seek any civil penalty for this alleged breach. The sole remedy sought is a declaration of contravention.

The second alleged breach of s 180

34 The termination of the Galderma Agreements is alleged to have occurred on 16 December 2016 and is pleaded to have been effective as of 1 January 2017. Mr Wilson does not admit that termination. But at trial he did not contest that the Termination Agreement had been entered into. While he suggested in evidence that Dr Castella (and presumably Mr Clements) entered into it without authority of the board of directors of Santalis (and presumably the board of ViroXis), his case did not rely on that alleged lack of authority, or any assertion that the Termination Agreement was legally ineffective for any other reason.

35 ASIC then alleges that Mr Wilson knew of this termination by February 2017 at the latest. The particulars given for this plea are telephone conversations between Mr Wilson and Dr Castella on 8 December and 15 December 2016, and an allegation that in February 2017, Dr Castella delivered a copy of the Termination Agreement to Mr Wilson prior to a meeting of 'the Board' in Perth. This appears to be referring to the Board of Quintis although, as will be seen, there

was also a potentially relevant meeting of the board of directors of Santalis which took place in Perth at around the same time. Mr Wilson denies all this.

36 ASIC then pleads that the hypothetical reasonable director would have (SOC para 19):

> a. recognised that:
>
> i. the Board would need to determine whether in order to comply with its continuous disclosure obligations it needed to inform the market of the existence of the Galderma Termination Agreement, and to do so in a timely manner;
>
> ii. if the Board failed to comply with its continuous disclosure obligations in a timely manner it would harm Quintis' reputation, jeopardise market perceptions of Quintis and expose it to the risk of legal and regulatory proceedings being brought against it, including for contravention of section 674(2) of the *Corporations Act*; and
>
> b. taken all necessary steps to ensure that the Board was promptly made aware of the execution of the Galderma Termination Agreement.

37 Section 674(2) of the *Corporations Act* contains an obligation for companies such as Quintis to make continuous disclosure of price sensitive information to the market. Once again, Mr Wilson pleads to this by referring back to his pleaded position on ASIC's allegations as to his state of knowledge and otherwise denying it.

38 ASIC alleges that Mr Wilson did not inform the Board of the execution of the Termination Agreement in February 2017 or at all. Mr Wilson admits this, of course in the context where he denies knowing about the Termination Agreement himself at that time. ASIC alleges that the Board thereby lost the opportunity to determine whether, in order to comply with its continuous disclosure obligations, it needed to inform the market of the existence of the Termination Agreement in a timely manner. Mr Wilson denies this. So arises the issue of the second alleged breach of s 180(1) by Mr Wilson, for which a civil penalty order is sought.

39 It is worth noting that nowhere does ASIC plead that Quintis *did* breach its continuous disclosure obligations. The allegation is that Quintis's Board lost an opportunity to determine *whether* it needed to disclose the existence of the Termination Agreement to the market. The question of whether it is open to ASIC to put its case this way - that is, to allege a contravention of s 180 by a director associated with breach of the law by the company without also pleading and proving the company's breach - is addressed later in these reasons. But assuming that it is open, an issue is nevertheless raised as to how likely it is that the continuous disclosure obligations would be breached in these circumstances.

40 It is raised because it is inherent in the plea that the hypothetical reasonable director would have recognised that if the Board (that is, Quintis) failed to comply with its continuous disclosure obligations in a timely manner, it would lead to the pleaded adverse consequences for Quintis. As an abstract proposition that is hardly contentious: if a company fails to comply with the continuous disclosure obligations that are imposed by the *Corporations Act* and the ASX Listing Rules, and monitored and enforced by ASX and ASIC, the company is exposed to a risk of consequences from the failure to comply. But there can be no breach of a director's duties of care and diligence in particular circumstances if the possibility of a breach of the continuous disclosure obligations in those circumstances is far-fetched or remote. The hypothetical reasonable director will see no need to raise a possibility of that kind with the board. So it is necessary to make, if not a finding of breach of the continuous disclosure obligations, at least an assessment of the seriousness of the risk of breach if the Termination Agreement was not disclosed. While ASIC has made no plea as to how serious the risk must be before the duty of care and diligence is breached, Mr Wilson did not claim to be prejudiced by that. He fought the matter on the basis that there was no breach of the continuous disclosure obligation (specifically, because ASIC had not established that the termination of the Galderma Agreements was price sensitive).

41 It may be that ASIC chose to avoid the need to prove that Quintis breached s 674 because it thought that this would make its case easier, but with respect, any such choice would be problematic. For one thing, it has substituted a well-established standard - that of breach of s 674(2) - for a less defined criterion (indeed, in the way the case is pleaded, an implicit one). But setting that aside, let it be supposed that, by setting the bar for itself lower than proof of an actual breach of s 674, ASIC has made it easier to prove that Mr Wilson breached s 180. Even so, whatever ASIC has thus gained is then lost by the need to assess, not just whether Mr Wilson has breached his duties under s 180, but also the consequences of the breach. Those consequences may be relevant at two points. They are relevant first in determining whether the breach of s 180 was serious or materially prejudicial, so as to meet the criteria for civil penalties imposed by s 1317G. And the second point at which they may be relevant in is determining penalty. The problem is that by eschewing any allegation of actual breach, ASIC removes the Court's ability to proceed on the basis that a breach occurred, even if the elements of a breach were otherwise established. It would not be fair to Mr Wilson if the Court were to make no finding that Quintis did breach s 674, but nevertheless to proceed for the purposes of s 1317G and any later assessment of penalty as if such a breach is established.

42 That conundrum would face the Court in this case (were it to decide that Mr Wilson had the pleaded knowledge). Despite avoiding any allegation of breach of s 674, in its particulars of why the alleged contraventions of s 180 were serious for the purposes of s 1317G, ASIC says that the information that Mr Wilson failed to disclose was 'significant' and that the failure to disclose the existence of the Termination Agreement in a timely manner 'denied the market accurate information' and 'had a distorting effect on the market for Quintis shares' (ASIC particulars 17 September 2021 paras 15(b)(i)(1), 15(c)(ii)(3), 15(d)(ii)(2)). So the Court is invited to make a finding of serious market-distorting consequences by reason of non-disclosure of significant information, and yet cannot proceed on the basis that s 674 is breached. While other findings I have made mean it will not be necessary to grapple fully with these involutions in ASIC's case, they are liable to make the Court's task harder.

The third, fourth and fifth alleged breaches (the 27 March Response)

43 Next, the SOC turns to the 27 March Response which Quintis made to the ASX queries which followed the Glaucus Report. It is alleged that Mr Wilson authorised and approved that response to be sent to the ASX for publication. Mr Wilson admits that Quintis made the 27 March Response and admits that he approved it (it took the form of a letter from him as Managing Director). But, he pleads, all the other directors approved it too. The Defence otherwise denies these allegations, although it is not clear what is left to deny.

44 ASIC pleads that by the 27 March Response, Quintis represented to actual and potential investors that as at 27 March 2017, Galderma was one of its customers, and that it would continue to sell EISO to Galderma at US$4,500 per kg until 2034 (plus CPI capped at 3%). Mr Wilson denies this. Therefore the question of what the 27 March Response conveyed is in dispute.

45 ASIC alleges that the publication by Quintis of the 27 March Response on the ASX announcements platform was conduct 'in relation to a financial product' within the meaning of s 1041H of the *Corporations Act*, which prohibits misleading or deceptive conduct in relation to a financial product or a financial service. Mr Wilson does not admit this but it was not seriously in dispute at trial. Then ASIC pleads that because Galderma had informed Santalis that it wanted to terminate the Galderma Agreements, and because the Termination Agreement had been executed, the making of the alleged representations 'was conduct that was potentially misleading or deceptive or likely to mislead or deceive' in contravention of s 1041H (SOC para 26). ASIC also pleads (SOC para 27) that the making of a representation that

Quintis would continue to sell EISO to Galderma at US$4,500 per kg until 2034 was conduct that was 'potentially misleading or deceptive or likely to mislead or deceive' in contravention of s 1041H because, in essence, the termination of the Galderma Agreements meant that there was no reasonable basis for the representation. Mr Wilson denies all these allegations.

46 I pause to note that the word 'potentially' appears in each of the pleas of misleading or deceptive conduct. As with the continuous disclosure breaches, it is expressly not part of ASIC's case that the 27 March Response *was* misleading or deceptive (or likely to mislead or deceive) in contravention of s 1041H. ASIC submits that it is sufficient for its case that Mr Wilson breached his duties of care and diligence under s 180(1) if the Court finds that the conduct was only potentially misleading. It follows that I cannot make a finding that the 27 March Response *was* misleading and then find that Mr Wilson breached his duties by reason of his involvement in that. ASIC did not contend otherwise.

47 At first blush, it appeared (once again) that ASIC may have considered that it would be easier to prove that the 27 March Response was potentially misleading than that it was actually misleading. But ASIC nevertheless does go on to allege that Mr Wilson's alleged conduct in relation to the 27 March Response 'denied the market accurate information by publishing misleading information'. Only, it makes that allegation, not in relation to whether there were breaches of s 180, but in the particulars it gives of why the breaches were serious for the purposes of s 1317G. The Court may still, therefore, be required to make a finding as to whether the 27 March Response was 'misleading' (there is no apparent difference between that and the phrase used in s 1041H, 'misleading or deceptive or likely to mislead or deceive': see *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198 (Gibbs CJ); *Australian Competition and Consumer Commission v SMS Global Pty Ltd* [2011] FCA 855 at [31]-[32] (Murphy J)). But it if it does make that finding, the Court will be in the artificial position of being unable to apply it for the purposes of determining whether s 180 has been breached. ASIC has pleaded all the elements of a misleading and deceptive conduct case without pleading that the prohibition on such conduct was contravened. Once again, these intricacies are liable to make the Court's task harder.

48 To return to the survey of the pleadings, ASIC goes on to allege that when Mr Wilson authorised and approved the 27 March Response, he knew that Galderma wanted to terminate the Galderma Agreements, was taking steps to terminate them, and had executed the Termination Agreement. That is based on the earlier allegations that Dr Castella told

Mr Wilson of these things in December 2016 and had given him a copy of the Termination Agreement in February 2017. Mr Wilson denies this knowledge.

49 So, ASIC pleads, the hypothetical reasonable director would have (SOC para 29):

> a. taken all necessary steps to ensure that the Board was promptly informed of the execution of the Galderma Termination Agreement prior to the publication of the [27 March] Response to ASX Query; and
>
> b. would not have authorised and approved the [27 March] Response to ASX Query without also taking all necessary steps to ensure that the execution of the Galderma Termination Agreement was disclosed to the market prior to, or at the same time as, the publication of the [27 March] Response to ASX Query.

50 Once again, it is inherent in this that the potentiality that the 27 March Response was misleading or deceptive was sufficiently serious to have prompted the hypothetical reasonable director to take the pleaded steps to inform the Board and the market.

51 In failing to do these things, ASIC pleads, Mr Wilson engaged in two contraventions of the *Corporations Act*. First, he authorised and approved the 27 March Response when it was potentially misleading in that it conveyed that Galderma was still one of Quintis's customers. Second, he authorised and approved the 27 March Response which was potentially misleading in that it conveyed that Quintis would continue to sell EISO to Galderma at US$4,500 per kg until 2034. Thus arise the issues about the third and fourth alleged contraventions of s 180(1).

52 At this point ASIC also pleads its alternative case of breach which, it says, can proceed even if the Court does not find that Mr Wilson knew about the Termination Agreement. The alternative case is that the hypothetical reasonable director, with knowledge of the numerous ASX announcements and annual reports and financial statements referring to the Galderma Agreements and Benzac, and knowledge that there was a real possibility that Galderma would seek to end the Galderma Agreements, 'would have taken steps to inform himself as to whether the Galderma Agreements remained on foot before he authorised and approved' the 27 March Response. It is said that Mr Wilson ought to have made enquiries of officers or employees of Santalis, including Dr Castella. Under this alternative case, that is something Mr Wilson did not do, which is the fifth and final alleged breach of s 180(1) of the *Corporations Act*. Mr Wilson's response to this in the Defence is to repeat his prior pleas about his state of knowledge and to otherwise deny.

The consequences of the alleged conduct

53 ASIC then pleads, and Mr Wilson admits, that Quintis's Board first became aware of the Termination Agreement on 9 May 2017. He also admits the disclosure to the market on 10 May 2017. ASIC pleads the effect of that on the share price, which Mr Wilson does not admit. Mr Wilson similarly admits a subsequent announcement that Quintis made on 6 June 2017 of the write off of AU$7.9 million in an intangible asset relating to the Galderma Agreements in the company's accounts.

54 ASIC's claim in relation to the 27 March Response is then stated to be that the making of the representations said to be contained in it 'exposed Quintis [to] the risk of … legal proceedings being brought against it' (SOC para 36). Mr Wilson does not admit this. ASIC then pleads that by failing to inform the Board of the Termination Agreement and by authorising and approving the 27 March Response, 'Mr Wilson harmed Quintis' reputation, jeopardised market perceptions of Quintis and exposed Quintis to the risk of legal and regulatory proceedings being brought against it, including for contraventions of s 674 of the *Corporations Act*' (SOC para 36A). Mr Wilson denies this. ASIC relies by way of particulars on alleged adverse market reaction to the announcement of 10 May 2017 and on the fact that two representative proceedings have been commenced against Quintis in this Court for alleged contraventions of s 674.

55 The place that these pleas as to consequences have in ASIC's case is not clear. Paragraph 36, which pleads a consequence of the making of alleged representations, appears to concern the alleged potential breach of s 1041H. Paragraph 36A, which refers to s 674, appears to concern the alleged failures to ensure continuous disclosure, or to give the Board the opportunity to do so. But it is unclear whether these pleas form part of the allegation of *breach*, or are only part of the alleged *consequences* of breach for the purposes of s 1317G and assessment of penalty. It will be necessary to return to this in Section VII(9) below.

56 In sum, then, there are five alleged contraventions: one that arose in the lead up to the termination of the Galderma Agreements; one that arose after the agreements were terminated and before the 27 March Response to the ASX; and three that arose as a result of the 27 March Response, one of which is put in the alternative to the other two. ASIC seeks declarations under s 1317E(1) of the *Corporations Act* in respect of each of these contraventions. That section provides that if the court is satisfied that a person has contravened a civil penalty

provision, which s 180(1) is (see s 1317E(3)(a) and first item in the table to the subsection), the court must make a declaration of contravention.

57 There are pleas that each of the alleged contraventions, other than the first (failure to inform the Board that Galderma wanted and was taking steps to terminate the Galderma Agreements), materially prejudiced the interests of Quintis or its members for the purposes of s 1317G(1)(b)(i) of the *Corporations Act* and was serious for the purposes of s 1317G(1)(b)(iii). Mr Wilson denies those pleas. ASIC has also provided further particulars of these matters, as follows:

(1) The first alleged breach where a civil penalty is sought - the alleged failure to tell the Board that Galderma had terminated the Galderma Agreements - materially prejudiced the interests of Quintis and its members and was serious because the nature of the information that was not disclosed was significant. This significance is said to be demonstrated by the numerous ASX announcements that Quintis made referring to Galderma and Benzac and by the AU$7.9 million write off on intangible assets after the termination was disclosed. Also, ASIC contends, the 'failure to provide the information left the Board to make their decisions based on incomplete information and deprived the Board of the opportunity to take any appropriate steps', including to determine whether it needed to inform the market of the termination in a timely manner. ASIC alleges that the Board would have announced the status of the Galderma Agreements to the ASX had it been made aware of the Termination Agreement. Once again, inherent in all this is an allegation that the possibility of a breach of s 674 was sufficiently serious to require consideration by the Board.

(2) ASIC further alleges that this breach of s 180 materially prejudiced the interests of Quintis and its members and was serious because the failure to make timely public disclosure exposed Quintis to legal proceedings for breach of s 674 (the continuous disclosure action) including the two class actions brought in this Court. The breach is also said to have been serious because the failure to make timely disclosure denied the market accurate information and had a distorting effect on the market for Quintis's shares, as evidenced by the 44% fall in the price when the termination was disclosed.

(3) In relation to the breaches alleged in ASIC's primary (not alternative) case about the 27 March Response, these are said to have materially prejudiced the interests of Quintis and its members and were serious because they potentially exposed Quintis to legal

proceedings for misleading conduct, giving false information, and similar breaches of the *Corporations Act* and the *Australian Securities and Investment Commission Act 2001* (Cth) (***ASIC Act***) in relation to financial products. They are said to have been serious because: the representations contained in the 27 March Response were in response to a written query from ASX; Mr Wilson's actions were deliberate and intentional, because he knew that Galderma intended to terminate the Galderma Agreements or that they had been terminated; and Mr Wilson's actions denied the market accurate information by publishing misleading information.

(4) Finally, the breach alleged in ASIC's alternative case is said to have materially prejudiced the interests of Quintis and its members and was serious because it exposed Quintis to legal proceedings for the same misleading conduct and similar breaches. It is said to have been serious because the 27 March Response was in response to a written query from ASX and Mr Wilson's actions denied the market accurate information by publishing misleading information.

Outline of the issues

58 The main issues that emerge from the pleadings as just described can be stated as follows:

(1) What were Mr Wilson's duties and responsibilities as Managing Director of Quintis? That is a question of fact concerning the specific kinds of things Mr Wilson was required to do by reason of holding that office. These duties and responsibilities are not the same as the statutory duty of care and diligence which s 180 of the *Corporations Act* imposes, and which Mr Wilson admits. But as will be seen they do provide necessary context for assessing whether that statutory duty was breached.

(2) What was conveyed by the 84 ASX announcements from 2014 to 2017 which mentioned the Galderma Agreements or Benzac, as well as the financial statements and annual reports that mentioned them? That too is a question of fact.

(3) By December 2016, how important were the Galderma Agreements to Quintis? On ASIC's case, this depends in part on the outcome of the previous issue, because the tenor of that case is that Quintis inflated market expectations by its many announcements, so that any puncturing of those expectations by news of termination of the Galderma Agreements was likely to have a material adverse effect on Quintis's share price. The tenor of Mr Wilson's case on this point, on the other hand, was that by

December 2016, the Galderma Agreements were in fact not material to Quintis's commercial position and prospects.

(4) Did Mr Wilson know by July 2016 that there was a real possibility that Galderma would seek to end the Galderma Agreements? That is against the background that Mr Wilson admits that by July 2016 he and all the other members of the Board did understand that there was a possibility that Galderma would seek to end the distribution of Benzac. It appears that this issue is relevant to ASIC's alternative case, that Mr Wilson breached s 180 of the *Corporations Act* by authorising and approving the 27 March Response to the ASX without satisfying himself that the Galderma Agreements remained on foot, even if he did not know of Galderma's firm intention to terminate, or of the actual termination.

(5) Did Mr Wilson find out before the execution of the Termination Agreement that Galderma had told Santalis that it did want to terminate the Galderma Agreements, and was taking steps to do so? This depends on the written and oral communications that Mr Wilson and Dr Castella had in early December 2016. It is common ground that they did communicate during that period, including by telephone, but the content of those communications was a matter of hot dispute.

(6) Assuming that it is established that Mr Wilson did know of Galderma's intention, would the hypothetical reasonable director with that knowledge have told the Board about that intention, in order that it could consider what Quintis should do at that time, that is, before the Galderma Agreements were actually terminated? Within that issue is the question of what opportunity, if any, the Board lost. Since ASIC is not seeking a civil penalty in relation to the omission to tell the Board about the prospective termination of the Galderma Agreements, no question of material prejudice or seriousness arises.

(7) By when did Mr Wilson know that the Galderma Agreements had been terminated? Was it by the time of the board meeting in Perth in February 2017 when, according to ASIC, Dr Castella gave Mr Wilson a copy of the Termination Agreement? ASIC alleges that this is the latest that he found out. The SOC also provides particulars of other occasions in which, it appears, it is alleged that he was told. But as will be seen when I come to consider this issue below, those occasions did not end up as part of ASIC's case.

(8) How likely is it that Quintis would have breached its continuous disclosure obligations, if it had been aware of the termination of the Galderma Agreements and failed to

disclose them to the market in a timely manner? That question goes both to the following issue, about what the hypothetical reasonable director would have done, and to the issues about material prejudice and seriousness that arise in the civil penalty context. Given the way ASIC has put its case, if there are gradations of certainty about the answer to this question, that needs to be taken into account. It is not necessarily going to have a clear cut answer informed by binary findings of fact on the balance of probabilities.

(9) What would the hypothetical reasonable director with knowledge of the execution of the Termination Agreement have done? In particular, would he (this is how the parties referred to the hypothetical reasonable director and so I will do the same) have informed the Board of the termination so that it could consider whether and how it needed to disclose that to the ASX, so that Quintis could fulfil its continuous disclosure obligations? This issue arises in the context of the plea that Dr Castella gave Mr Wilson a copy of the Termination Agreement before a board meeting in February 2017, so the question is what the hypothetical reasonable director would have done upon being informed at that time.

(10) What did the 27 March Response convey to the market? Did it make representations that as at the time of the response, Galderma was one of Quintis's customers, and that Quintis would continue to sell EISO to Galderma at a certain price until 2034?

(11) Was the 27 March Response potentially misleading or deceptive because Galderma had informed Santalis that it wanted to terminate the Galderma Agreements and because the Termination Agreement had been executed? As has been said, what is not in issue, and what the Court will not find, is that the 27 March Response *was* misleading or deceptive in breach of s 1041H of the *Corporations Act*.

(12) In light of the resolution of the issues about Mr Wilson's knowledge that have already been described, what would the hypothetical reasonable director with that knowledge have done before authorising and approving release of the 27 March Response, including taking steps to disclose the termination of the Galderma Agreements to the market?

(13) Returning to ASIC's alternative case, if the hypothetical reasonable director had known only that there was a real possibility that Galderma would seek to end the Galderma Agreements, what enquiries (if any) would that director have made of Santalis in order

to be satisfied that the agreements were still on foot before authorising the 27 March Response?

(14) Broadly, what adverse consequences (if any) did the alleged failure to disclose the termination of the Galderma Agreements, and the release of the 27 March Response, have for Quintis in light of the subsequent disclosure of the termination? Did it harm Quintis's reputation, jeopardise market perceptions of the company, and expose it to regulatory and other legal proceedings?

(15) In light of the resolution of all these issues, which (if any) of Mr Wilson's five alleged contraventions of s 180 occurred, recalling that the last is put in the alternative?

(16) Did any contraventions that are found to have occurred materially prejudice the interests of Quintis or its members, or were they serious, for the reasons alleged by ASIC in its particulars? Very broadly (and without distinguishing between the different alleged contraventions at this point) those reasons are that the information about the termination of the Galderma Agreements was significant and should have been disclosed to the market, and that the failure to disclose exposed Quintis to legal and reputational risk, and distorted the market by denying it accurate information. An allegation that Mr Wilson's actions in relation to the content of the 27 March Response were intentional and deliberate is an aspect of this.

III. THE WITNESSES

59 I will give my general impression of the witnesses. I recorded these impressions during the trial. The content of their evidence and the findings I make about it are contained in subsequent sections.

60 This was a case where each party sought to impugn the credibility of the main witness for the other party, so it will be necessary to address the subject at some length. To be clear, when I speak of credibility in this judgment I mean the believability of the evidence. This can of course be affected by assessments of the honesty of the witness, but it is not necessarily the same thing; it can also refer to other reasons why the evidence of the witness is more or less reliable.

Paul Charles Castella

61 Dr Castella has a PhD in Cell Biology. He founded ViroXis along with his business partner Mr Clements in 2006. As has already been described, ViroXis and Quintis formed Santalis as

a joint venture company owned in equal shares in 2010. Quintis acquired both ViroXis and the 50% of shares in Santalis it did not already own in June 2015. From that time on, which is the period most relevant to this proceeding, Dr Castella was employed as CEO and President of both ViroXis (renamed at this time Santalis Healthcare [Inc]) and Santalis (that is, Santalis Pharmaceuticals, Inc.).

62 Dr Castella's evidence was central to ASIC's case. It was to the effect that he told Mr Wilson about the termination of the Galderma Agreements close to the time that he learned of it, so that Mr Wilson was aware of the prospect of termination from early December 2016, and was aware that it had actually happened 'sometime' after the execution of the Termination Agreement on behalf of ViroXis and Santalis on 16 December 2016. Mr Wilson disputes that he was told about the termination. As a result, robust challenges to Dr Castella's credibility were made during cross examination.

63 Dr Castella gave his oral evidence by video link from San Antonio, Texas. It was given over four mornings in Perth, which for him were evenings. The last of those evenings was a short one; the other three ended at about 10.30 pm in San Antonio. The audio-visual quality of the link was good throughout and Dr Castella's reactions were clearly visible on large screens in court and on a screen before me. I could see those reactions better than I could see those of the witnesses who were present in person in the witness box. Despite reservations I held at the time of *Australian Securities and Investments Commission v Wilson* [2020] FCA 873, I did not perceive that the video link was any obstacle to the ability of senior counsel for Mr Wilson to subject Dr Castella to a rigorous cross examination. As I am about to describe, that cross examination did expose inadequacies in Dr Castella's evidence which significantly undermined ASIC's case.

64 Often, Dr Castella's recollection appeared to be imprecise and he occasionally presented as disengaged from the questions he was being asked. He frequently shuffled around and swayed backward and forward in his chair. His evidence about certain crucial conversations with Mr Wilson was adduced orally in chief and, without guidance from leading questions, was quite vague. He summarised his current impression of the overall import of the conversations, and did not remember specific things that were said. Details that could be inferred from the surrounding correspondence were lacking from his recollection, at least until he was specifically referred to that correspondence.

65 By itself, that is all unremarkable. Dr Castella was being asked to recall conversations which took place some five years previously, of which he had no contemporaneous record, and which did not have the significance for him at the time which they now have in the context of this proceeding. His shuffling and swaying could have been a product of the nerves that inevitably accompany being cross examined in court. Nevertheless, his description of the conversations often lacked conviction, and I formed the impression that he did not have a very strong recollection of them at all.

66 For other reasons, I did not find Dr Castella to be a satisfactory witness. Too often he could not give a simple and straightforward answer to the questions put to him. Rather than answer 'yes' or 'no', or say he did not know, he would respond in an equivocal way, or appear to evade the question, or embark on long and often tangential explanations. He was in the habit of answering questions calling for a yes or no answer with 'Okay'. The cross examiner would sometimes pointedly ask whether he meant to express agreement by that but, understandably, did not do that every time. I was left with the impression that answering that way often reflected Dr Castella's unwillingness to commit to an answer. He was often hesitant about doing so. The following passage from his cross examination is illustrative of his approach throughout much of it (ts 182-183):

> And your evidence is, when you said that, this is what you say at 51 of your affidavit:
>
> *The mention of TFS in my email was, in fact, a reference to the understanding and general principles of TFS based on my dealings with Mr Wilson.*
>
> Is that what you say?---Okay.
>
> Is that what you say today?---That's what's written.
>
> In your affidavit?---Yes.
>
> Is that your evidence?--- ..... TFS - - -
>
> So your email - - -?---Okay, so what's the question?
>
> Well, when you said:
>
> *TFS would prefer we buy new oil from them rather than product already sold.*
>
> You had no communication from anybody at TFS about that on 28 November or, I put to you, at any other time. Is that correct?---Well, if you're telling me I hadn't spoken to Frank at that point, I would say that was me making a presumption about TFS' interest or TFS' preference.
>
> So you've just made this up, have you, when you say:
>
> *TFS would prefer we buy new oil from them rather than product already sold.*
>
> You are guessing that that is what TFS's position would be, are you?---I think 'guessing' is the incorrect word.

> Predicting?---All right. I think it's a reasonable assumption to make that TFS would prefer oil be bought from them rather than from someone we had previously sold it to and buying it back, so however you want to phrase that.
>
> Well, it's just obvious?---Obvious, yes. Obvious. There you go. Obvious.
>
> All right. It's just - and so it wasn't based on an understanding of the general principles of TFS based on your dealings with Mr Wilson, was it?---I think 'obvious' is a fairly good word. I think it's consistent with all my interactions with Frank, that he would agree with - preferring me to buy oil from them. So what do you want me to say here?
>
> Could the transcript record that there was a substantial delay prior to the provision of that answer by the witness …

67 As the cross examiner noted, Dr Castella paused for a very long time before giving the final answer in this passage. More broadly the impression given in the passage, and much of Dr Castella's other evidence, was of someone who was reconstructing the narrative as he went along, based on what was put to him or what he thought was likely, rather than someone remembering what had occurred.

68 Dr Castella also presented as someone who was unwilling to commit to that narrative. For example, he frequently responded to cross examination about details such as telephone calls by asking what the call logs showed. It is unrealistic to expect any ordinary person to remember precise details of telephone calls held several years ago, unless they were especially significant for the person. But Dr Castella purported to recall them in his affidavit, yet in his oral evidence he consistently sought to defer to written records such as logs of telephone calls made, about which calls he appeared to have no actual knowledge. On a number of occasions, Dr Castella would respond to questioning by saying, for example, 'if that's what the calls show then that's … what happened' (ts 180), or, in response to a question on whether he recalled a decision being made regarding his margin loan, '[n]ot specifically, but if you say so' (ts 277).

69 Dr Castella's cross examination also exposed inadequacies in the affidavits that had been prepared for him and that he had affirmed. For example, at paragraph 79 of his first affidavit (**PC1**) (which paragraph was not formally read into evidence, but came out in cross examination), Dr Castella said that he gave a hard copy of the Termination Agreement to Mr Wilson before a Quintis Board meeting in Perth, but in his oral evidence he said it was before a Santalis board meeting, also held in Perth, two days before the Quintis meeting. While nothing in particular turned on the difference, it is regrettable that Dr Castella and those drafting the affidavit were so imprecise about an occasion that was of crucial importance in his evidence.

70 Dr Castella sometimes came up with new details on important matters during cross examination that were not mentioned in the affidavits. For example, it emerged that, according to him, Mr Wilson had not only told him on 1 December 2016 that he did not want to be sent any copies of the Termination Agreement, which was in his first affidavit, but also that prior to that, Mr Wilson had somehow conveyed that he was 'circumspect' about the types of information that should be communicated to him by email about the Galderma arrangements, including a specific detail about a US$2,477 per kg rebate. That was not mentioned in his affidavits. I accept that new details can come to a person during cross examination which do not come to mind when preparing an affidavit, and I do not consider that it necessarily means that either the affidavit or the subsequent recollection is fabricated. When asked why he did not put certain material in his affidavit in 2018, Dr Castella responded that he would have 'If it had occurred to me' (ts 202). But the frequency with which Dr Castella revealed new details in oral evidence or altered the story he had presented in his affidavit reflected poorly on the reliability and completeness of the affidavits and, potentially, on the reliability of the oral evidence.

71 However Dr Castella's level of engagement with the questioning, and his level of conviction, increased markedly when he was subject to direct challenge in cross examination. It was put to him that he had concealed a number of matters from Mr Wilson. Each time he replied clearly and robustly that he had told Mr Wilson of the matters. It was put to him that he was a liar and a con man. He appeared unperturbed by those accusations and refuted them clearly. He expressed exasperation with the notion that Quintis personnel, including Mr Wilson and Mr Gooding, did not know about the termination of the Galderma Agreements before May 2017, and his exasperation appeared genuine.

72 On occasion Dr Castella was prepared to concede that he had not behaved irreproachably; for example he accepted that his failure to tell the boards of Santalis and Quintis about the rebate on EISO sold to Galderma could have resulted in those boards being misled. In general I found that candour enhanced the credibility of his evidence. He accepted that he had followed instructions from Mr Wilson which led him to conduct aspects of Santalis's business in an irregular way. While this was less than honest, it was not, in my view, the 'gross dishonesty' which senior counsel for Mr Wilson put to Dr Castella. It was a truthful account of Dr Castella's complicity in what was (in his account) the withholding of the termination of the Galderma Agreements from Quintis's Board.

73 As will be explained when I make findings below, despite these numerous reservations I have accepted Dr Castella's evidence on some key points. I do not accept Mr Wilson's attempt to paint Dr Castella as a liar and a con man. But I do accept that his evidence was unreliable, except to the extent that it was supported by the inherent objective probabilities of the situation, the evidence of other, reliable witnesses, or the documentary record. In some cases where it had such support, I have accepted Dr Castella's evidence. At other points where it has lacked that support, I have not. The difference has proved to be crucial to the outcome of the case, and it will be necessary to return to the subject of the reliability of Dr Castella's evidence below.

Gillian Anne Franklin

74 Ms Franklin is the founder and Managing Director of the Heat Group, a cosmetics and personal care manufacturer and distributor. She has 30 years' experience in that industry and is an experienced company director. She was a non-executive director of Quintis from December 2014 until her resignation on 30 June 2017.

75 Like the other directors whom I mention in the next section, Ms Franklin was not challenged on any aspect of her evidence, but I am dealing with her separately because of her specific evidence that at the Quintis Board meeting on 24 February 2017, she asked Dr Castella about EISO sales to Galderma and received an answer. The content of that evidence and its significance will be addressed below, but it is worthwhile to say at the outset that I found Ms Franklin to be a convincing witness with a clear recollection of events, so that I will give her evidence some weight.

Other lay witnesses called by ASIC

76 The evidence of the remaining lay witnesses called by ASIC was largely not contentious. They can be dealt with more briefly and together.

77 Dalton Leslie Gooding, Julius Luke Matthys, Giovanni (John) Groppoli and Michael Doveton Kay were each members of Quintis's Board during the period relevant to this proceeding. They are all experienced company directors. Mr Gooding was non-executive Chairman of Quintis's Board from November 2014 and was also a director of Santalis and ViroXis from around June 2015. Mr Matthys was initially a director of Quintis from 2003 to 2005 and again from 2011 until 2018. He took over as CEO of Quintis on 3 April 2017 following Mr Wilson's resignation as Managing Director on 27 March 2017. Mr Groppoli is an experienced lawyer and was a

non-executive director of Quintis from October 2014 to June 2018. Mr Kay was a non-executive director of Quintis from February 2015 to June 2018.

78 Alistair David John Stevens is the CFO of the Quintis group of companies. He is a chartered accountant who has worked in CFO or deputy CFO roles for a number of companies in the United Kingdom and Australia. He took great care in giving his answers. Perhaps sometimes he deliberated or qualified what he said too much, but I did not form the view that he was doing so in order to be obstructive.

79 Phillip Lodewikus Coetzer is the Group Financial Controller of the Quintis group of companies, reporting to Mr Stevens. He was given certain responsibilities concerning Santalis in late 2016, the evidence as to which will be described below.

80 Of these six witnesses, only Mr Stevens was subject to any real challenge in cross examination, and not on a subject that has proved material to the outcome. Each of these witnesses gave their answers in a straightforward way. I accept them all as witnesses of truth and have no reason to doubt the reliability of their evidence.

Lee Bowers

81 Mr Bowers is the Managing Director of Fivemark Capital Pty Ltd, trading as Fivemark Partners, a corporate advisory and investor relations firm. He worked from 2003 until 2013 as a mining equities analyst. In 2013, he co-founded Fivemark Partners, where he works as a corporate adviser and equity market consultant. Mr Bowers described his role as involving impact analysis, which he said involved predicting share valuations and price movements and analysing market trading dynamics. Examples he gave of the kind of work he was engaged in included asset evaluation and valuation, investment advice, trading decision making and scenario analysis.

82 Mr Bowers gave evidence on questions which, in broad terms, concerned the extent to which the information about the Galderma Agreements allegedly withheld from the market was likely to have influenced investors in deciding whether to buy or sell shares in Quintis. ASIC sought to qualify Mr Bowers as an expert witness. Mr Wilson, however, made a comprehensive challenge to the admissibility of Mr Bowers' evidence based, in part, on his asserted areas of experience and expertise, so it will be necessary to return to those subjects in Section VI of this judgment.

83 In cross examination, Mr Bowers came across as a careful and thorough expert witness. He was occasionally loquacious and there were times when his answers veered towards advocacy rather than impartial opinion. But those times were rare; for the most part he gave his evidence in a measured and balanced way and was prepared to concede points to the cross examiner when appropriate. Senior counsel for Mr Wilson confined his questioning to Mr Bowers' reasoning process and did not seek to impugn his impartiality or otherwise suggest that he had arrived at views were not independent or not genuinely held. In broad terms I found his evidence to be helpful.

Frank Cullity Wilson

84 As I have indicated, the defendant, Mr Wilson, relied on the privilege against exposure to a penalty so as to decline to put on any evidence until ASIC closed its case. At that point, and in accordance with directions made by the court, Mr Wilson elected to go into evidence. He filed the substituted defence which I have described and relied on one affidavit (**FW**), sworn by him on 15 September 2021, setting out evidence about the relevant events.

85 According to Quintis's 2016 Annual Report, before becoming Quintis's founding Chairman in 2000, Mr Wilson was the Managing Partner of the legal firm Wilson & Atkinson, which at that time specialised in taxation, property and commercial law. He practised for some 15 years, and was an experienced tax and commercial lawyer. The Annual Report also said that Mr Wilson was an experienced businessman who had a long standing involvement in the forestry industry. I have already given his history as a director and executive officer of Quintis.

86 In the witness box Mr Wilson displayed a good grasp of the commercial and legal details surrounding the Galderma Agreements, but he did not profess to be proficient in technical details such as the pharmaceutical properties of Benzac or matters such as clinical trials. My impression was that he left that aspect of the dealings with Galderma to Dr Castella and Mr Clements.

87 Senior counsel for ASIC cross examined Mr Wilson for nearly 3½ days. He was generally confident and assured in the witness box. Generally, he listened to questions and answered them directly, although I will refer to some exceptions to that below. He appeared physically uncomfortable under some lines of questioning but I do not read much into that; being cross examined for over three days is bound to make anyone uncomfortable from time to time. Mr Wilson occasionally became agitated when he was confronted with allegations of

dishonesty, but that quickly subsided when the questions moved to the next topic and in general he approached the questioning in a cooperative way.

88 It was not the manner in which Mr Wilson gave evidence, but the content of the evidence which gave me concern. That is because when pressed on important matters, Mr Wilson consistently retreated to implausible positions and unsubstantiated generalities. Necessarily, that broad observation will be developed in the narrative of the evidence I give below. For now I will give two examples.

89 One example concerned Mr Wilson's evidence that he was aware of a draft letter from Galderma dated 17 November 2015 which proposed significant changes to Galderma's relationship with Santalis, but not the final signed version of the letter which Galderma sent to Dr Castella on 5 February 2016. The draft letter of 17 November 2015 said that Galderma would analyse 'the long-term financial viability of Benzac and any other factors deemed appropriate by Galderma to determine Galderma's position with respect to the future of its partnership with TFS and Santalis relating to the Benzac brand'. Mr Wilson refused on several occasions to accept that this was notice that Galderma was thinking about cancelling the Galderma Agreements. He even refused to accept that it was a reading of the letter that was reasonably open. Plainly, it was at least open.

90 I also did not find plausible Mr Wilson's evidence that, although Galderma had engaged in 'commercial bullying' (ts 533), he thought a proposal of that kind was something that Quintis did not need to negotiate or respond to. This appeared designed to bolster his evidence that he did not see the final version of the letter that was sent by Mr McCrea on 5 February 2016, because he was content to let the draft proposal of 17 November 2015 fall away without response. The implausibility of this evidence was then compounded by his evidence suggesting that the letter of 5 February 2016 about Benzac was not mentioned once in a 'long and cordial' telephone conference he had, also about Benzac, with Galderma representatives on 9 February 2016 (ts 572, 574, Exh 370). At that point Mr Wilson's evidence reverted from an outright denial to saying that he could not recollect the letter being mentioned. Mr Wilson took that approach on other occasions when his evidence became improbable.

91 Another example was an exception to Mr Wilson's general willingness to answer questions directly. It occurred after senior counsel for ASIC took Mr Wilson to an ASX announcement that Quintis made on 2 September 2016 which included the following passage (Exh 495):

> TFS now has multiple supply contracts in place with global customers for both wood and oil products across a breadth of markets including cosmetics, aromatherapy, pharmaceuticals, and traditional wood uses, meaning the vast majority of our harvests are now forward sold through to 2021.

92 The following exchange ensued (ts 639-640):

> And you point to the breadth of markets including pharmaceuticals?---Yes.
>
> So that's a reference to the Galderma Benzac contract?---I'm not too sure about that.
>
> Well, what other contract did you have with a pharmaceutical company at 2 September 2016, Mr Wilson?---We - we had - - -
>
> None?---We had a number of small - small contracts with pharmaceutical companies through Mount Romance but not, you know, not - - -
>
> What global customer did you have in the pharmaceutical market?---I couldn't tell you their name, but I can tell you that we had several through Mount Romance.
>
> Is your answer to this court that outside of Galderma, you had another global customer in the pharmaceutical industry?---Absolutely, yes.
>
> Okay. And so his Honour should not understand this ASX release to be referring to Galderma. Is that your evidence?---No, no, that's not my evidence.
>
> So, can his Honour take it that when you refer to pharmaceuticals, you are referring, with these others, to Galderma?---I have no recollection of - of this particular release but it's - Galderma was a contract we had in the pharmaceutical space. At that time, we were trying for - we had several small ones through Mount Romance and, yes. So it - I may have been referring to - I can't recall.
>
> Well, Mr Wilson is there a reason you won't accept the obvious; Galderma was a global customer, wasn't it?---Yes.
>
> And it was a global customer in pharmaceuticals?---Yes.
>
> And are you telling his Honour that when you were quoted in this ASX release, when you refer to global customers for pharmaceuticals, you were not referring to Galderma?---I can't recall who I was referring to, but I was making the point that TFS - TFS didn't have, and Mount Romance didn't have five customers; we had about 150.
>
> Who were global?---Yes, by nature, we're an export business.

93 Mr Wilson ended up accepting that the reference to global pharmaceutical customers included Galderma. This was after his senior counsel obtained confirmation that senior counsel for ASIC did not suggest that Galderma was the only such customer it referred to. But the clarification was not necessary to enable Mr Wilson to answer the question. The point of the question was clear from the outset and, anyway, it is doubtful that a global customer is the same thing as a customer located overseas, as Mr Wilson appeared to suggest. Mr Wilson was clutching at that suggestion in order to justify his denial of the obvious.

94 Another, important example of Mr Wilson's tendency to deny matters that appeared on the face of the evidence was his attempt to explain away a statement he made in an email to Mr Matthys, that he was aware because Dr Castella advised him that Galderma had entered into an agreement with Santalis that had the effect that Galderma would make a decision in July 2017 regarding the termination of 'the contract'. Also unsatisfactory were his attempts to explain away a text messages he sent to Dr Castella on 9 May 2017. These matters are addressed in Sections V and VII below.

95 As for Mr Wilson's resort to unsubstantiated generalities, on many occasions when pressed with specific instances where a matter concerning the Galderma Agreements appeared not to have been disclosed to the Board, he fell back on one excerpt from one CEO report he gave to the Board in August 2015. As will be explained below, I do not consider that this report provided adequate disclosure to the Board about the state of the relationship with Galderma in August 2015, let alone throughout the entire period to March 2017. But Mr Wilson kept coming back to it as the basis for saying such things as 'the board were fully across and aware of all the problems that we were having with Benzac and Galderma from August onwards' (ts 540), or 'I brought the general issue of a negotiation with Galderma on, you know, all those points and others to the board in August' (ts 514; see also ts 524, 532, 542, 570, 583, 596-597, 644, 645, 666, 670, 690, 710; and see also ts from Day 12).

96 Similarly, Mr Wilson asserted that 'it was widely known, amongst the institutional investor shareholders in TFS and the institutional investor world that followed TFS, that the Galderma contract or the Benzac product had not performed to expectations' (ts 614). But it transpired that the only specific information he could give as the basis of that view was a report to the Board by Mr Stevens of a conversation he had with one investor, Phil King, who referred to 'the slow progress of Benzac' (Exh 504, ts 648). Mr Wilson said 'I would have told anyone who was willing to listen to me that Benzac wasn't - wasn't performing' (ts 630, 648), but that general self-serving evidence was unsupported by any specific communications with investors.

97 For these reasons, and because of the several occasions detailed below in which I found Mr Wilson's evidence to be implausible, I did not find him to be a credible witness.

IV. PRINCIPLES

Proof

98 This is a case which posed difficult forensic issues. Which of the two key witnesses was telling the truth, or at least accurately recollecting the key events? It is therefore worth setting out the approach that must be taken to the burden of proof, the standard of proof, and assessment of the evidence where there are robust challenges to the credibility of witnesses.

Burden and standard of proof

99 It is common ground that the burden of proof in this matter rests entirely on ASIC. Mr Wilson's defence is premised on a denial that he knew the information which, it is said, he failed to disclose to the other members of the Board, and a denial that the omission to disclose the information exposed Quintis to relevant jeopardy, to an extent that resulted in a breach of s 180(1) of the *Corporations Act*. Mr Wilson has not raised any affirmative defence for which he has the burden of proof.

100 The burden of proof can become particularly important when the Court decides that it is not satisfied as to the case of either of the parties. It may reject both cases. Disbelief of one does not require acceptance of the other. In that eventuality, the Court has open to it the third choice of saying that the party with the burden of proving the allegations it has made has failed to discharge that burden: see *Kuligowski v Metrobus* [2004] HCA 34; (2004) 220 CLR 363 at [60]. As undesirable as that may be, there are cases where the unsatisfactory state of the evidence or of other aspects of the case means that is the only just course for the Court to take: *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985] 2 All ER 712 at 718.

101 The standard of proof is governed by s 140 of the *Evidence Act 1995* (Cth), which provides:

> (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
>
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
>
> (a) the nature of the cause of action or defence; and
>
> (b) the nature of the subject-matter of the proceeding; and
>
> (c) the gravity of the matters alleged.

102 It was also common ground that this reflects the principles that Dixon J explained in ***Briginshaw*** *v Briginshaw* (1938) 60 CLR 336: see *Australian Securities and Investments*

Commission v Mitchell (No 2) [2020] FCA 1098 at [1123] (Beach J). As well-known as those principles are, they are important in this case so it is helpful to set out relevant passages here. After considering the views of academic commentators which suggested some flexibility in the statement and application of the standard of proof in civil cases, Dixon J said (at 361-362):

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

103 After explaining that even in cases involving serious allegations, some issues may not need to be proved on strong evidence, Dixon J went on to say (at 362-363, citations removed):

> It is often said that such an issue as fraud must be proved 'clearly', 'unequivocally', 'strictly' or 'with certainty'. This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues. But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected.

104 Later, after dismissing the idea that there was some different standard of proof on the issue of adultery in divorce proceedings, Dixon J said (at 368-369):

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

105 In ***Neat Holdings*** *Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 450, Mason CJ, Brennan, Deane and Gaudron JJ explained these principles as follows (footnotes removed):

> Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.

106 The conventional perception so described is not very helpful in this case. The allegation made against Mr Wilson is, at least in form, that he failed to exercise powers and discharge duties with the requisite degree of care and diligence. Dishonesty and criminality are not elements of the alleged breach, although the allegation that the conduct was serious because it was deliberate comes close. Views may reasonably differ as to the improbability of such a failure in the circumstances alleged here. Most importantly, though, one of the key planks of Mr Wilson's defence is that Dr Castella did engage in deliberately dishonest behaviour. While I do not suggest that there is any onus on Mr Wilson to establish that Dr Castella was dishonest, to the extent that he submits that he was, the common sense approach reflected in their Honours' 'conventional perception' points away from accepting that submission.

107 The second matter mentioned in the summary in *Neat Holdings* has more weight in this case. Although dishonesty is not alleged, findings adverse to Mr Wilson in the proceeding are likely to seriously affect his reputation. Also, while the proceeding is not criminal, ASIC does seek civil penalties, which is of course a serious matter. It also seeks Mr Wilson's disqualification from managing corporations. It follows that the court will only reach a state of reasonable satisfaction that Mr Wilson breached s 180(1) if there is clear proof of the kind described in *Briginshaw*. ASIC did not suggest otherwise.

Inferences and circumstantial proof

108 It does not follow from the conclusion just expressed that only direct evidence is capable of establishing ASIC's case. By 'direct evidence' I mean, specifically in this case, the evidence of Dr Castella that he told Mr Wilson about Galderma's intention to terminate the Galderma Agreements and that he gave a copy of the Termination Agreement to him. My doubts about the credibility of both Dr Castella and Mr Wilson mean that the question of whether other evidence may suffice to discharge ASIC's burden to the requisite standard is relevant.

109 The answer to that question is that, even if I do not find Dr Castella credible, or at least relevant aspects of his evidence reliable, I may still find that ASIC has made out its case. Inferences can be drawn from the available evidence, including the body of documentary evidence. It is permissible to draw inferences from a combination of facts: *Australian Securities and Investments Commission v* ***Big Star*** *Energy Ltd (No 3)* [2020] FCA 1442 at [30] (Banks-Smith J).

110 In *Vines v Australian Securities and Investments Commission* [2007] NSWCA 75; (2007) 73 NSWLR 451 at [810], Ipp JA (Spigelman CJ agreeing) emphasised that '[n]othing in *Briginshaw* detracts from the proposition that a serious allegation might be proved by "circumstantial evidentiary facts" and "inference and circumstance"'. In *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5-6, Dixon, Williams, Webb, Fullagar and Kitto JJ explained that process of reasoning as follows:

> … you need only circumstances raising a more probable inference in favour of what is alleged … where direct proof is not available it is enough [if] the circumstances appearing in the evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is [a] mere matter of conjecture … All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than on the balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood.

111 Thus the Court is not authorised to choose between guesses on the ground that one seems more likely than the others. 'The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied': ***Jones v Dunkel*** (1959) 101 CLR 298 at 305 (Dixon CJ, in dissent but not on this point).

112 The probative force of a combination of circumstantial facts may be cumulative and it may be an error to assess the probability of each of them individually: *Australian Broadcasting Corporation v Chau Chak Wing* [2019] FCAFC 125; (2019) 271 FCR 632 at [134]-[135]. Ultimately, there are no hard and fast rules. 'The inquiry is simply, taking due account of what was said in *Neat Holdings* … has the allegation been proved on a balance of probabilities': *Palmer v Dolman* [2005] NSWCA 361 at [47] (Ipp JA, Tobias and Basten JJA agreeing).

Unreliable witnesses and the objective framework

113 It is orthodox and sensible in a case like this to form views about the reliability of witnesses based not only on observations made and impressions formed about their demeanour, but also

reasoning as to the plausibility of certain parts of their evidence, considered in the light of the objective factual surrounding material and the inherent commercial probabilities, together with the documentation tendered in evidence: *Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd* [1999] HCA 15 at [16] (Gleeson CJ, Gaudron, Kirby and Hayne JJ). Greater weight may be given to contemporaneous or near-contemporaneous documents than to fallible human memory, especially when the lapse of time between the events in question and the trial is long and especially when the witnesses have an interest in the outcome of the litigation: see *Chant v Curcuruto* [2021] NSWSC 751 at [269] (Hallen J) and the authorities referred to there.

114 In a case where conflicting accounts are given by witnesses who each lack credibility or reliability, to resolve the conflict by comparing the extent to which they each lacked those qualities can be a challenging task, so it is sensible to prefer, instead, to resolve it by reference to the contemporaneous objective evidence: see *Krolczyk v Winner* [2022] NSWCA 196 at [88], [90] (Griffiths AJA, White and Kirk JJA agreeing).

The statutory provisions

The duty of care and diligence as a civil penalty provision

115 Section 180(1) of the *Corporations Act* provides:

> 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.

Section 180(2) and s 180(3) concern a defence known as the business judgment rule, which is not relevant here.

116 The standard in s 180(1) concerns the exercise of powers and duties, so those powers and duties need to be identified before the provision can be applied: *Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52; (2020) 275 FCR 533 (***Cassimatis FC***) at [452] (Thawley J). In ***Shafron*** *v Australian Securities and Investments Commission* [2012] HCA 18; (2012) 247 CLR 465 at [18], French CJ and Gummow, Hayne, Crennan, Kiefel and Bell JJ described the standard set by s 180 as follows (emphasis in original):

> The degree of care and diligence that is required by s 180(1) is fixed as an objective standard identified by reference to two relevant elements - the element identified in para (a): 'the corporation's circumstances', and the element identified in para (b): the office *and* the responsibilities within the corporation that the officer in question occupied and had. No doubt, those responsibilities include any responsibility that is imposed on the officer by the applicable corporations legislation. But the responsibilities referred to in s 180(1) are not confined to statutory responsibilities; they include *whatever* responsibilities the officer concerned had within the corporation, regardless of how or why those responsibilities came to be imposed on that officer.

117 Thus the application of s 180(1) is not confined to the powers and duties which the law attaches to a particular office: see also *Australian Securities and Investments Commission v* ***King*** [2020] HCA 4; (2020) 270 CLR 1 at [33] (Kiefel CJ, Gageler and Keane JJ). The inquiry must be directed to the role the person in question plays in the corporation: *Shafron* at [23]; *King* at [35]. That is inevitably a factual inquiry which depends on all the relevant circumstances. It is concerned with whether the facts show that a putative officer has played a role in the corporation and the nature and extent of that role, not with some a priori classification of their position: *King* at [35].

118 As to the 'corporation's circumstances', these necessarily include any breach or potential breach of law by the corporation, as well as all of the relevant commercial and other circumstances and the conduct of the corporation: *Cassimatis FC* at [456].

119 Directors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company, but they are entitled to rely on others, unless they know, or by the exercise of ordinary care should know, facts that indicate that they cannot so rely: *Australian Securities and Investments Commission v* ***Maxwell*** [2006] NSWSC 1052 at [101] (Brereton J).

120 Unlike the tort of negligence, damage is not an element of contravention of s 180(1). There is no reference to damage in the section. Actual loss to the company is not required. Nevertheless, the section will not be contravened unless the acts or omissions relied on carried with them a foreseeable risk of harm to the company. That is because if there is no such risk at the time of the acts or omissions, they will not be capable of constituting a failure to exercise powers and discharge duties with a degree of care and diligence that a reasonable person would exercise. Those duties cannot be defined without reference to the nature and extent of foreseeable risk of harm to the company that would otherwise arise. See ***Vrisakis*** *v Australian Securities Commission* (1993) 9 WAR 395 at 449 (Ipp J, Malcolm CJ concurring); *Maxwell*

at [102] (Brereton J); *Australian Securities and Investments Commission v* ***Mariner*** *Corporation Limited* [2015] FCA 589; (2015) 241 FCR 502 at [447]-[449] (Beach J); *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023 (***Cassimatis PJ***) at [481] (Edelman J).

121 This can include a reasonably foreseeable risk that the company will be led to breach the law. In *Maxwell* at [104] Brereton J said:

> There are cases in which it will be a contravention of their duties, owed to the company, for directors to authorise or permit the company to commit contraventions of provisions of the *Corporations Act*. Relevant jeopardy to the interests of the company may be found in the actual or potential exposure of the company to civil penalties or other liability under the Act, and it may no doubt be a breach of a relevant duty for a director to embark on or authorise a course which attracts the risk of that exposure, at least if the risk is clear and the countervailing potential benefits insignificant …

122 So in *Cassimatis PJ* at [480]-[482], Edelman J emphasised that the concept of harm inherent in the notion of foreseeable risk could be harm to any interests of the company, not just financial ones, and given the broad terms of the legislation, should not be confined narrowly. At [483] his Honour concluded (emphasis in original):

> … that the foreseeable risk of harm to the corporation which falls to be considered in s 180(1) is not confined to financial harm. It includes harm to *all* the interests of the corporation. The interests of the corporation, including its reputation, include its interests which relate to compliance with the law.

123 This is a balancing exercise of the kind described, in relation to the tort of negligence, in the well-known dictum of Mason J in *Wyong Shire Council v Shirt* (1980) 146 CLR 40, in particular at 47-48:

> The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.

See *Cassimatis PJ* at [486].

124 In *Cassimatis PJ* at [487], Edelman J went on to further describe the exercise as follows, applying to s 180 *New South Wales v* ***Fahy*** [2007] HCA 20; (2007) 232 CLR 486, a case also concerning the tort of negligence:

> This exercise is 'forward looking' to what a reasonable person would have done, not backward looking at what would have avoided the injury: [*Fahy*] at [57] … (Gummow and Hayne JJ). And, as Gleeson CJ said in *Fahy* at [6]:
>
> > What is involved is a judgment about reasonableness, and reasonableness is not amenable to exact calculation. The metaphor of balancing, or weighing competing considerations, is commonly and appropriately used to describe a process of judgment, but the things that are being weighed are not always commensurate.

A Full Court (Greenwood, Davies and Markovic JJ) applied Edelman J's dictum in the context of s 180 in *Asden Developments Pty Ltd (in liq) v Dinoris* [2017] FCAFC 117 at [90].

125 In *Maxwell* at [110], Brereton J described the balancing exercise particular to allegations of breach of duty connected with breaches of the law by companies as follows:

> Whether there were in this case breaches of the directors' duties - and, in particular, of their duty of care and diligence - depends upon an analysis of whether and to what extent the corporation's interests were jeopardised, and if they were, whether the risks obviously outweighed any potential countervailing benefits, and whether there were reasonable steps which could have been taken to avoid them.

126 Thus in determining whether the standard mandated by s 180(1) has been breached, it will be relevant to balance the foreseeable risk of harm to the company (along with the difficulty of taking alleviating action) against the benefits that could reasonably be expected to have accrued to the company from the relevant conduct: *Mariner* at [451]-[452]; *Cassimatis FC* at [458]. This is sometimes put in terms of the desirability of not dampening a director's 'entrepreneurial flair', a phrase taken from *Daniels (formerly practising as Deloitte Haskins & Sells) v Anderson* (1995) 37 NSWLR 438 at 494. But it is difficult to see how that can be an appropriate consideration where what is being weighed against it is a serious breach of the law: see *Cassimatis PJ* at [482] and the example of discharging toxic waste given at [485]. A company's failure to comply with its continuous disclosure obligations cannot be justified on the basis that to comply would be to lose a commercial opportunity: *Big Star* at [514]. It may be that the same cannot be said where the commercial opportunity is balanced against a *potential* breach of the law, as the harm against which a possible benefit must be weighed is less clear cut. To the subject of potential breaches I now turn.

Potential breaches

127 I have described in Section II how ASIC does not allege that Mr Wilson's acts or omissions resulted in Quintis actually breaching s 674 of the *Corporations Act* (continuous disclosure) or s 1041H (misleading or deceptive conduct in relation to a financial product). In relation to

continuous disclosure, the claimed breach of duty depends, instead, on an allegation that the hypothetical reasonable director would have given the Board the opportunity to decide whether to comply with its continuous disclosure obligations by disclosing the existence of the Termination Agreement to the market, and that by not telling the Board about that agreement Mr Wilson denied the Board that opportunity, and further that the hypothetical reasonable director would have ensured that the execution of the Termination Agreement was disclosed to the market in or before the 27 March Response. In relation to misleading or deceptive conduct, the claimed breach of duty depends on a finding that Mr Wilson authorised and approved, and failed to prevent the issue of, the 27 March Response, when that was potentially misleading or deceptive.

128 Are either of these cases of breach of s 180 of the *Corporations Act* open as a matter of law? ASIC opened by submitting that a contravention of s 180(1) can be established without proving damage to the corporation and that the relevant assessment is whether there was a foreseeable risk of harm to the corporation and whether that risk required different conduct on the part of the director. ASIC submitted that breach can be found when the director 'embarks upon or authorises a course of action which attracts a risk of exposing the company to civil or regulatory proceedings' (opening submissions para 102). It submitted that it is not necessary for the corporation to be found to have breached the *Corporations Act* before a breach of s 180 by one of its officers can be found. Rather, it is enough to establish a risk to the corporation. At one point in his opening, senior counsel for ASIC put that it was 'sufficient to show in all of the circumstances that there was obviously an appreciable risk of damage to the corporation … that the corporation would be put into harm's way' (ts 64). However he then eschewed any attempt to describe the level of risk required as a 'legal standard', maintaining instead that it was a question of fact as to whether the risk is 'sufficient' or 'sufficiently apparent' to engage s 180 (ts 65). In closing, senior counsel for ASIC put it as a purely factual question as to whether the hypothetical reasonable director 'forward-looking in real time' would have seen a risk such that he or she would have done something different to what Mr Wilson in fact did (ts 804).

129 In his written closing submissions, Mr Wilson argued at some length that the law in Australia was that where ASIC alleges that a director has breached s 180 by causing the company to commit a wrong, the wrong must be an actual breach of the *Corporations Act* that exposed the company to a pecuniary penalty or civil liability. But in oral closing submissions, senior counsel for Mr Wilson disavowed any submission that if ASIC does not plead or prove that

there was a contravention (of s 674) then ASIC's case must fail. He acknowledged that there was authority permitting ASIC to advance a case of breach of s 180 arising because Mr Wilson's conduct caused Quintis to be exposed to risk. Senior counsel accepted that as a matter of law it was open to ASIC to put such a case, and that ASIC's pleading was not liable to be struck out for failing to disclose a reasonable cause of action. The emphasis in his submissions was that if exposure to risk is alleged, it has to be proved.

130 I proceed, therefore, on the basis that Mr Wilson did not ultimately contest ASIC's submissions as to the law on this point. Nevertheless, it is necessary for the Court to assess the matter for itself; a concession on a matter of law does not relieve the Court of the obligation to determine and apply the correct law: *O'Connor v O'Connor* [2022] NSWCA 97 at [67]. Mr Wilson's concession means, however, that my treatment of the question can be briefer than it otherwise would be.

131 In my view, the concession is well made, based on general principles set out above. Section 180 does not stipulate that the company has suffered actual loss or damage in order for it to have been breached, let alone that the company has been led into actual contravention of any law by reason of the director's conduct. What it does require is a foreseeable risk of harm. A risk of suffering penalties for breaching the law is a risk of harm. And harm is properly understood more broadly than that as including harm to intangible interests of the corporation, such as its reputation. A risk that a company will be found to have broken the law or, conceivably, a risk that it will be perceived to have broken it, is a risk of harm, so understood. A company may run a risk of such tangible and intangible harms whether or not it is ever actually found to have contravened any law.

132 This understanding of s 180 is reinforced by the forward looking nature of the exercise; what the Court has to assess is what the hypothetical reasonable director would have done (or not done) at the time of the alleged breach in all the corporation's circumstances. Looking forward from many situations, it will not be known whether the company will actually contravene the law. It can hardly be suggested that this uncertainty alone exempts a director from weighing the risks carefully. There appears to me to be no warrant for reading some implied restriction into s 180 that only if the harm is later found to have resulted from an actual contravention of the law will the director's duties of care and diligence have been breached.

133 ASIC relied on Beach J's discussion of the question in *Mariner* at [456] where his Honour accepted, without much enthusiasm, that it was conceivable that where a company might be in

contravention of the *Corporations Act*, that could cause harm to the company. But there are dicta in other cases where the possibility is embraced with a little more enthusiasm, including *Maxwell* at [104] and *Cassimatis PJ* at [5], [679]. In *Cassimatis FC* a majority of the Full Court upheld *Cassimatis PJ*, although the fact that ASIC had based its case on actual contraventions limits what can be derived for present purposes from the judgments of the majority or that of Rares J in the minority. There is support, however, in dicta of Thawley J at [463]-[464] for the general approach that a forward looking assessment of risk of the kind described above does not entail that there must (later) be proved to have been an actual breach of the law by the company for the director to have breached s 180. Again, in light of Mr Wilson's concession it is not necessary to set these various dicta out.

134 On the other hand, the standard is set by reference to what a hypothetical reasonable director would have done in circumstances where, at the time when the decision to act or not to act is made, it may not be known whether the conduct will breach the law. Decisions about disclosure to the market in particular can be difficult ones, and the directors of a company may honestly and reasonably believe that disclosure is not required where, later, a court might disagree: see *Australian Securities and Investments Commission v* ***Vocation*** *Limited (In Liquidation)* [2019] FCA 807 at [730] (Nicholas J). The question is always: faced with the risks and benefits that the director knew of, or ought reasonably to have known of, what would the hypothetical reasonable director have done, taking care and acting with diligence in the interests of the company? For that reason, I accept ASIC's submission that it is not necessary or appropriate to seek to define the level of risk of breach by the company that must exist before the director will have contravened s 180. What the hypothetical reasonable director would have done is a question of fact to be assessed objectively in all the particular circumstances of the case, and a fact intensive one at that.

135 Finally, in accepting that it is open as a matter of law to plead and prove a contravention of s 180 by a director as a result of a potential breach of the law by the company, without pleading and proving that the breach by the company actually occurred, I am not suggesting that ASIC can or should adopt, in every case, a practice of setting itself a lower bar by studiously avoiding any allegation of actual breach by the company. I have already had cause to complain of conceptual difficulties caused by ASIC's approach in this case. And several of the dicta to which I have referred acknowledge the possibility of breach of s 180 in fairly stringent terms; for example in *Cassimatis PJ* at [5], Edelman J posited a situation where 'a director unreasonably (within the terms of s 180(1)) and intentionally commits acts which are extremely

likely to involve a serious breach of the *Corporations Act* perhaps even threatening the very existence of the corporation'. Even if ASIC does not have to prove actual breach by the company, that does not mean that its task will necessarily be an easy one.

Civil penalties

136 If s 180 has been breached, it may be open to the Court to impose civil penalties. Section 180(1) is a 'corporation/scheme civil penalty provision': s 1317E(3)(a) and first item in table. If the court is satisfied that a person has contravened the provision, it must make a declaration of contravention: s 1317E(1). That is not discretionary: *Australian Securities and Investments Commission v Helou (No 2)* [2020] FCA 1650 at [140] (Beach J). Under s 1317E(2)(a) to (e), the declaration must relevantly specify the court that made the declaration, the civil penalty provision that was contravened, the person who contravened the provision, the conduct that constituted the contravention and the corporation to which the conduct related.

137 Section 1317G(1) relevantly provides:

> A Court may order a person to pay to the Commonwealth a pecuniary penalty in relation to the contravention of a civil penalty provision if:
>
> (a) a declaration of contravention of the civil penalty provision by the person has been made under section 1317E; and
>
> (b) if the contravention is of a corporation/scheme civil penalty provision, the contravention:
>
> (i) materially prejudices the interests of the corporation, scheme or fund, or its members; or
>
> (ii) materially prejudices the corporation's ability to pay its creditors; or
>
> (iii) is serious …

138 Given my ultimate conclusions, it is not necessary to address what is meant by material prejudice or seriousness in this context.

139 If those requirements are met, it will be open to the Court to impose penalties. The maximum pecuniary penalty applicable to a contravention of a civil penalty provision by an individual is the greater of 5,000 penalty units, which for the relevant period amounted to $900,000, and, if it can be determined, three times the benefit derived and detriment avoided because of the contravention.

140 As well as a pecuniary penalty, on application by ASIC the court may disqualify a person from managing corporations for a period that the court considers appropriate if a declaration is made under s 1317E and the court is satisfied that the disqualification is justified.

Continuous disclosure

141 Section 674 imposes obligations of continuous disclosure on a company. As has been addressed above, ASIC does not squarely allege that those obligations were breached in this case, rather, it alleges that a hypothetical reasonable director would have given the Board the opportunity to decide whether to comply with its continuous disclosure obligations and that by not telling the Board about the Termination Agreement, Mr Wilson denied the Board that opportunity. It also pleads that the hypothetical reasonable director would not have authorised and approved the 27 March Response without ensuring that the Termination Agreement had been disclosed to the market.

142 The other place s 674 seems to occupy in ASIC's case is that Mr Wilson's alleged breaches are said to have exposed Quintis to the risk of legal and regulatory proceedings being brought against it, including for contraventions of s 674 (SOC para 36A). ASIC's pleading does not say whether this only goes to the questions of material prejudice and seriousness that are addressed just above, or also goes to whether there was a breach of s 180. Mr Wilson submitted it was both.

143 It is therefore relevant to consider the principles that govern s 674, even if there is no need to find whether the section was actually breached by Quintis. It is uncontroversial that at all material times Quintis was a 'listed disclosing entity' for the purposes of s 674, and that the ASX Listing Rules required Quintis to notify ASX of information about specified events or matters as they arise for the purpose of ASX making that information available to participants in the market: s 674(1). This means that, by reason of s 674(1), s 674(2) applied to Quintis. Quintis would then breach s 674(2) if it did not notify ASX, in accordance with the ASX Listing Rules, of information that those rules required it to notify to ASX, if that information was not generally available, and was 'information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value' of shares in Quintis (**material information**).

144 What information, then, did the ASX Listing Rules require Quintis to notify? At the relevant time, r 3.1 of the ASX Listing Rules provided:

> Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.

The rule gave a non-exhaustive list of examples of the type of information that, depending on the circumstances, could require disclosure to ASX. The termination of a material agreement is one example given.

145 Returning to the *Corporations Act*, is it also relevant that s 677 stipulates that for the purpose of s 674:

> a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities of a disclosing entity if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities.

Shares in Quintis were ED securities. This is a deeming provision which provides a sufficient foundation for establishing the materiality requirement in s 674(2), albeit it does not impose a necessary condition: see ***Earglow*** *Pty Ltd v Newcrest Mining Ltd* [2015] FCA 328; (2015) 230 FCR 469 at [82].

146 These provisions are remedial or protective and they should be construed beneficially to the investing public in a manner which gives the fullest relief which the fair meaning of their language allows: *Grant-Taylor v Babcock & Brown Limited (in liquidation)* [2016] FCAFC 60; (2016) 245 FCR 402 (***Babcock & Brown FC***) at [93] (Allsop CJ, Gilmour and Beach JJ). The *Corporations Act* and the ASX Listing Rules are to be given a concordant operation, so that r 3.1 should be taken to embrace the concept elaborated in s 677 that 'material effect' may be established by reference to what would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the relevant shares: *Babcock & Brown FC* at [95].

147 The inquiry is an objective and hypothetical one, which involves a question of fact: *National Australia Bank v* ***Pathway Investments*** [2012] VSCA 168 at [87] (Bell AJA, Bongiorno and Harper JJA agreeing); *Big Star* at [235]. It is to be conducted as at the time at which it is alleged that the disclosure should have occurred and involves a survey of all the relevant material: *Grant-Taylor v Babcock & Brown Limited (In Liquidation)* [2015] FCA 149 (***Babcock & Brown PJ***) at [64] (Perram J). This approach of assessing the matter as if looking forward from the time at which the alleged act or omission occurred was referred to by the Full Court on appeal as looking at the question 'through an *ex ante* lens': *Babcock & Brown FC*

at [95]. This 'ex ante' approach has been accepted in several other cases: *Vocation* at [587]; *Big Star* at [239]; *Australian Securities and Investments Commission v* ***GetSwift*** *Ltd* [2021] FCA 1384 at [1094]-[1095].

148 In order to satisfy this materiality requirement, the information must be non-trivial and rise beyond information that merely might influence investors; the words of s 677 are 'would, or would be likely to': *Babcock & Brown FC* at [96]; *Vocation* at [519]. It is necessary to assess the impact of the information on decisions made by persons who commonly invest in securities as a class, which will include large or small, sophisticated and unsophisticated and frequent and infrequent investors (but not irrational investors): *Babcock & Brown FC* at [115]. It may also be necessary to consider the information in its broader context, including whether there is additional information which may have had an impact on the assessment of the particular information it is alleged should have been disclosed: *Vocation* at [566], applying *Jubilee Mines v Riley* [2009] WASCA 62; (2009) 40 WAR 299.

149 Evidence from large institutional or wholesale investors (including fund managers) as to their expectation of materiality may be relevant (*Earglow* at [84(b)]), but ASIC has not adduced any such evidence in this proceeding. What it has adduced is expert evidence. It is well established that the materiality of the information not disclosed is a matter that is appropriately addressed by evidence from suitably qualified share-trading experts: see *Pathway Investments* at [88]; *Big Star* at [240]; *GetSwift* at [1100]. But expert evidence will not be determinative: *GetSwift* at [1100]. Whether information is material is 'the Court's decision after an evaluation of the whole of the evidence. Even if there was no other evidence apart from the company's own deliberations, it remains for the trial judge to evaluate whether information is material so as to require disclosure under s 674': *James Hardie Industries NV v Australian Securities and Investments Commission* [2010] NSWCA 332 at [527] (Spigelman CJ, Beazley and Giles JJA). In that case, the Court of Appeal was content to uphold inferences made by the trial judge without the benefit of expert evidence: see in particular [525], [539]-[540].

150 It is permissible to examine how the market subsequently behaved when the relevant information was disclosed as a device for confirming the correctness of a conclusion already reached: *Babcock & Brown PJ* at [64]; see also *GetSwift* at [1103]. Although, Perram J criticised the logic of this because 'presumably the subsequent material is excluded from the analysis because it is not logically probative', and if that is so, 'how can it be useful as a checking mechanism?': *Babcock & Brown PJ* at [64]. It may be permissible to analyse

information about share price movements by use of a statistical technique known as linear regression analysis which, broadly speaking, permits the elimination of other causes of price fluctuations, so as to isolate the effect of disclosure of the allegedly material information: see *Earglow* at [88], albeit those observations were made in the context of whether non-disclosure of information had a price-inflationary effect causative of investor loss. In any event, ASIC made no attempt to make use of that technique here.

151 In the end, the resolution of the question upon an ex ante approach is a matter of judgment, informed by commercial common sense and, if necessary, by evidence from persons who have practical experience in buying and selling shares and in the workings of the stock market: *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)* [2009] FCA 1586 at [511] (Gilmour J), quoted with approval in *GetSwift* at [1101], see also [1165], [1240]. It 'demands an appreciation of the broader context, investor experience and intuitive realism': *GetSwift* at [1259].

152 Although the test of breach of s 674 is objective, it must be borne in mind that in this case, the ultimate question is not whether Quintis was required to disclose, but what the hypothetical reasonable director would have done faced with the risk of contravention (and with any potential commercial downside of disclosure).

Section 1041H - misleading or deceptive conduct in relation to a financial product

153 Similarly, the allegation that the 27 March Response was potentially misleading or deceptive requires consideration of s 1041H(1) of the *Corporations Act*, which provides that a person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or likely to mislead or deceive. Engaging in conduct in relation to a financial product includes publishing a notice in relation to a financial product. It is uncontroversial that shares in Quintis were financial products and that the announcement to the ASX on 27 March 2017 was a notice in relation to a financial product and so was conduct in relation to a financial product.

154 Quintis's conduct in publishing the notice would be misleading or deceptive, or likely to mislead or deceive, if there were a real and not remote possibility (which may be less than 50%) that it would lead persons into error. In the case of conduct of this kind which involved giving information to the public, or a section of it, the effect of the conduct is to be assessed by reference to the likely characteristics of the persons who comprised the relevant class of persons, and it is necessary to consider the likely effect of the conduct on ordinary or reasonable

members of the class, disregarding reactions that might be regarded as extreme or fanciful: see *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2020] FCAFC 130; (2020) 278 FCR 450 at [22]. The manner in which members of the class are likely to encounter a representation can be relevant; for example, something said in a 15 second television advertisement will not be considered as carefully as something said in a share market announcement which can be expected to be read attentively by at least some reasonable members of the relevant class: see *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 540 at [47] (French CJ, Crennan, Bell and Keane JJ).

V. NARRATIVE OF THE EVIDENCE

155 This was a trial where certain issues of fact were hotly contested on the basis that one or the other of the two main witnesses was lying. It is not possible to resolve the disputed issues properly without placing them in their proper context in the narrative of relevant events. What follows is a largely chronological account of the evidence, within the framework of the uncontentious factual background that has already been set out, and with observations on some matters of dispute made along the way. After undertaking that exercise, I will analyse and resolve the issues outlined above so as to arrive at the ultimate outcome of this 'liability' phase of the trial.

Supply agreements between Quintis, ViroXis and Santalis

156 Quintis had agreed to supply EISO to ViroXis in 2009. The two companies incorporated Santalis as their 50/50 owned joint venture vehicle in 2010.

157 There were further iterations of the supply agreement between Quintis and ViroXis. On 9 May 2013 those two companies entered into a 'Definitive Supply Agreement', under which Quintis was to supply ViroXis with EISO and Western Australian sandalwood oil (**WASO**) (s 1.16, s 3.1). The quantities were to be set by way of binding forecasts which ViroXis was to submit to Quintis annually (s 3.1). The intent of the agreement was to provide ViroXis with supplies of EISO and WASO from Quintis exclusively, for use only in Rx or OTC products of certain specified kinds (s 1.22, s 3.6). The term of the agreement was 20 years, unless extended by agreement or terminated at ViroXis's option or for breach (s 10). The price for EISO was to be US$4,500 per kg, adjusted for inflation (s 5.3, s 5.4, Schedule B).

158 On 4 June 2013 Quintis entered into a similar Definitive Supply Agreement with Santalis. This was itself an iteration of an original supply agreement from 2011. Once again, the minimum volume was to be set by binding forecasts which Santalis was to provide to Quintis annually (s 3.1). The intention was for Quintis to provide Santalis 'with exclusive supply' of EISO and WASO for use in defined 'Healthcare Products', being products intended for human use in which sandalwood extracts (including EISO and WASO) were listed as an ingredient on the label and for which regulatory approval or similar was required to lawfully market it, whether Rx, OTC or sold direct to consumers (s 3.7, s 1.10). The term of the agreement was the later of 20 years and the date of the last agreement between Santalis and a third party to supply, distribute, manufacture or license a Healthcare Product, unless terminated earlier for breach (s 10). Once again the price of EISO was to be US$4,500 per kg, adjusted for inflation (s 5).

The Galderma Agreements

159 On 20 February 2014 Galderma and Santalis entered into their own 'Definitive Supply Agreement'. This obliged Santalis to supply Galderma with EISO which Santalis had the right to obtain under its supply agreement with Quintis (s 2.1). Galderma was to purchase the product from Santalis in order to make specified sandalwood oil products (s 2.2). Galderma was not required to order any minimum quantity, but it did agree that it would not acquire EISO from any source other than Santalis (or an unnamed alternative supplier which Galderma had the right to 'qualify' under a procedure set out in a particular section of the agreement - s 2.5). Once again, the quantity of product to be supplied was to be set by annual binding forecasts which Galderma was to submit to Santalis (s 2.3). Specifically between November 1 and November 15 of each calendar year (other than 2014), Galderma was to submit to Santalis a written binding forecast showing Galderma's requirements for EISO, the 'forecasted amount', for the twelve month period beginning 1 January the following year, the 'forecast period'. The agreement also provided that Galderma would provide an updated non-binding three year plan of reasonable forecast supply needs of EISO for the next three calendar years. For the balance of the calendar year 2014, Galderma was to submit to Santalis a written binding forecast showing Galderma's requirements for EISO for the period to 31 December 2014. In summary, there was no obligation upon Galderma to purchase any EISO, save for what may have been forecasted. There is no evidence to show that Galderma ever submitted a forecast.

160 Once again, the price of EISO was to be US$4,500, indexed for inflation. The term of the agreement was to be the earlier of 20 years, or termination of the related licence agreement (see

next paragraph), or termination of the supply agreement between Quintis and Santalis, or earlier for breach (s 8).

161 Also on 20 February 2014, Santalis entered into a licence agreement under which it granted Galderma a licence to use certain intellectual property for the purpose of Galderma making, distributing, marketing, using and selling defined acne products using sandalwood oil obtained from Quintis (or the alternative supplier) (s 2.1, s 1.2, s 1.36, s 1.44). This agreement concerned Santalis's existing and future OTC sandalwood oil based skin care products designed to treat acne (s 1.2). It also contained an option for Galderma to obtain a licence for eczema products which was exercisable by 31 January 2015 (s 3.2). The agreement provided for various fees and royalties payable by Galderma to Santalis (s 4), including a royalty of 3% of net sales of acne products and minimum royalties on those products for the first five years, rising from US$100,000 in the first year to US$200,000 in the fifth year. The term of the licence agreement was to be 99 years unless terminated earlier for breach, however Santalis had the opportunity to terminate it if Galderma did not meet certain deadlines for launch of an acne product, exercise of the eczema option, or launch of an eczema product, and Galderma had the ability to terminate it without reason on giving 24 months written notice (s 5). If the agreement were terminated under that provision, certain minimum royalty payments would continue to be payable during that 24 month period, but the supply agreement with Santalis would fall away.

162 Also on 20 February 2014, Galderma and ViroXis entered into a supply agreement and a licence agreement for ViroXis to supply WASO sourced from Quintis to Galderma to permit Galderma to make products for the treatment of human papillomavirus (**HPV**, that is, warts). Once again, the volume of product supplied was to be set by annual binding forecasts submitted by Galderma to ViroXis. However the licence would not be operative unless Galderma exercised an option over it, which had to occur by 31 January 2015 (s 2). The terms were otherwise substantially similar to the terms of the supply agreement and licence agreement between Galderma and Santalis.

163 It is these four agreements, already defined as the 'Galderma Agreements', that were terminated in December 2016, giving rise to ASIC's allegations of breach.

Market announcements about the Galderma Agreements and Benzac in 2014

164 On 25 February 2014 Quintis placed its shares into a trading halt on the ASX. On 26 February 2014, the company made an announcement to the ASX of (Exh 48):

> the execution of a licence agreement with a global pharmaceutical company for the marketing of certain of Santalis' dermatology products. These dermatology products will contain TFS's Indian Sandalwood oil through a new long-term exclusive supply agreement which has been executed in conjunction with the licence.

165 While the global pharmaceutical company was not named in the announcement, it was described as 'exclusively dedicated to dermatology and a world leader in dermatology products with an extensive product portfolio available in 80 countries'. The licence agreement was said to contemplate 'worldwide commercialisation of certain of Santalis' current and future over the counter ("OTC") product ranges on an exclusive basis, with an initial launch in the U.S. expected at the end of 2014'.

166 In the announcement, Mr Wilson is quoted as saying:

> Santalis' agreement with a world class pharmaceutical partner opens up a new and substantial market for TFS's Indian Sandalwood oil. The supply agreement broadly mirrors our current price for Indian Sandalwood oil and has the potential to consume a significant proportion of TFS's oil output into the long term. TFS expects these agreements to be the first of many such product opportunities as TFS's Indian Sandalwood oil becomes an increasingly important natural ingredient in the rapidly expanding global market for dermatology, which is currently estimated to exceed US$20 billion per annum.
>
> Our long-term and exclusive supply agreement with Santalis has been pivotal to securing the commitment of a world-class partner. TFS has supported Santalis' research and development activities over the last three years and the benefits of this investment are evident in the creation of this substantial market opportunity and new strategic partnership …

167 On 5 March 2014 Quintis made an announcement to the ASX of its first order for pharmaceutical grade Indian sandalwood oil under the supply agreement which had been announced on 26 February 2014 (that is, the supply agreement between Galderma and Santalis) (Exh 59). The order was for 100 kg of EISO which was expected to be delivered the following week. The announcement said that the 'global pharmaceutical company plans to launch a range of dermatology products using TFS's Indian Sandalwood oil in the United States later in 2014'. Mr Wilson was quoted as referring to 'product launches expected later in 2014'. Paragraphs at the end of the announcement under the heading 'Background' repeated the announcement of the licence and supply agreements with the global pharmaceutical company and the description of the company given in the announcement of 25 February 2014.

168 The relationship with Galderma was mentioned in numerous subsequent announcements and other communications with investors. An investor presentation which was released to the ASX

on 10 March 2014 described the 'New Supply Agreement with Global Pharmaceutical Company' as follows (Exh 60):

> - A landmark deal for TFS which confirms a market price for TFS oil and provides the final component in the 'soil to oil' value chain.
> - Global pharmaceutical company has an extensive product set, available in 80 countries.
> - Exclusive supply agreement has the potential to consume a large proportion of TFS's oil over the long-term.
> - Contracted oil price provides an attractive return to TFS.
> - TFS expects a suite of future supply agreements with pharmaceutical companies for other dermatology products and skin indications.

169 The relationship with Galderma was mentioned in announcements of developments which, on their face, had little to do with it. For example, on 24 March 2014 Quintis announced that ViroXis had received approval in relation to a study for a treatment for a condition known as molluscum contagiosum (Exh 64). The announcement quoted Mr Wilson as saying:

> This is another important milestone in the development of a global market for TFS's pharmaceutical grade EISO in the dermatology sector. It builds on the exclusive supply agreement with a leading global dermatology company (announced on 26 February 2014) for over the counter dermatology products, which are expected to launch in the United States later this year. We are excited by the prospect of TFS EISO becoming a core ingredient in a suite of over the counter and prescription dermatology products with a strong pipeline of new products being developed with our pharmaceutical partners ViroXis and Santalis.

170 Similarly, on 27 March 2014, in a quote attributed to Mr Wilson in an announcement of a new institutional investor, he took the opportunity to refer to 'the announcement of a new supply contract with a global pharmaceutical company in February' (Exh 67).

171 On 2 June 2014, Quintis made another ASX release by way of 'trading update and reaffirmation of guidance' which included an announcement that it had received an order for a further 370 kg of pharmaceutical grade Indian sandalwood oil under the supply agreement with Santalis. It referred to Galderma (still not by name at this time) as 'TFS's global dermatology partner'. According to the announcement, the oil was to be used 'for commercial scale production trials of the skin products licensed by TFS's joint venture, Santalis, to the global dermatology company. These trials are a precedent to the first over-the-counter products being launched in Q414' (Exh 93). On 1 August 2014, Quintis made another announcement that it had harvested

wood from a directly owned plantation which had been distilled into pharmaceutical grade oil and sold to 'TFS's dermatological partner at a price of US$4,500 per kg' (Exh 107).

172 For reasons that are not clear from the evidence, it seems that it was not until August 2014 that Quintis publicly named its 'global dermatology partner'. On 14 August 2014 at a conference in Boston, Mr Wilson gave a presentation about Quintis which spoke of the 'Supply Agreement with Galderma' in the following terms (Exh 110):

> - In February, a landmark deal was finalised with Galderma, wholly owned by Nestle, the world's leading nutrition, health and wellness company, for the supply by TFS of pharmaceutical grade oil.
> - Galderma is a global dermatology company with a worldwide network of distributors, more than 4,500 employees and an extensive product portfolio available in 80 countries.
> - Long-term supply agreement for TFS pharmaceutical grade oil at a price of US$4,500 per kg.
> - Galderma has the potential to consume a large proportion of TFS's oil over the long-term. Total orders to date of 470 kg (AU$2.3m) are being used in commercial scale production trials for skin products that will initially launch in the US in Q414.

173 At another point in the presentation, on a page headed 'Rapidly Advancing Several Products to Market' it said:

> **First consumer product launch later this year for one OTC product line (four acne products)**
>
> - Products licensed to Galderma S.A, wholly owned by Nestle, by Santalis
> - US launch by Galderma is expected in Q4CY14 into major distribution channels
> - Global launches expected to follow in 2015 (including eczema)

174 The Chairman's report in the Annual Report for FYE 2014 (released on 27 October 2014) called the signing of the supply agreement with Galderma a 'significant milestone achieved this financial year' and said (Exh 147):

> The achievement of a sale price of US$4,500 per kilogram of oil under an exclusive supply agreement with Galderma, gives us great confidence, subject to ongoing consumer uptake, in the company's future profitability and cash flows over the coming decade.

The signing of the 'Landmark supply agreement with Galderma' was called a 'MAJOR SUPPLY DEAL' in a graphic showing highlights for the financial year. In the 'TFS Group Profile' section the Annual Report said:

> With distribution in more than 80 countries, Galderma has the potential to consume a large proportion of TFS's future oil production. The first launches of over-the-counter, medicinal skincare products are planned for the near term, with global launches set to follow. Already TFS has supplied 470 kilograms of pharmaceutical-grade Indian Sandalwood (Santalum album) oil, or $2.3 million in sales.

Other statements emphasising Galderma's global reach, how the 'licence agreement contemplates worldwide commercialisation', and that Galderma was a 'world class partner' appeared in the Directors' Report.

175 On 28 November 2014, Mr Gooding as Non-Executive Chairman of Quintis made an address to the annual general meeting of the company which was also released to the ASX (Exh 169). In the address, Mr Gooding said, 'the TFS owned sandalwood has already been processed into oil and sold into the US as pharmaceutical grade sandalwood oil, following a supply agreement with global dermatology leader Galderma. I will talk about this landmark deal in more detail later on'. Further on in the address, Mr Gooding said:

> Our supply agreement with Galderma is a great example of the underlying value of our plantation assets. Galderma is a global dermatology leader. A subsidiary of Nestlé, it possesses an extensive product portfolio distributed to 80 countries. Under our agreement, TFS is supplying pharmaceutical grade oil at a price of US$4,500 per kilogram, with Galderma taking all of our oil last year and the vast majority of production in the current year. The key product the oil is being used for is an over-the-counter acne product called Benzac.
>
> It is worthwhile reflecting on the size of this market. There are 40-50 million acne sufferers in the US alone. $4 billion worth of acne products are sold each year in the US. If TFS and Galderma can tap just a fraction of that market then the demand for TFS's sandalwood oil from the US alone will be enormous.

176 The announcements to the ASX described above are but a subset of the announcements that Quintis made in calendar year 2014 that referred to Galderma or the Galderma Agreements. The company's annual financial statements for FYE 2014 also referred to Galderma as a 'world-class partner' for the Quintis group (Exh 117), the presentation of the results for that financial year referred to a 'landmark supply agreement with Galderma' and 'global dermatology leader Galderma' (Exh 119), and one investor presentation made by Mr Wilson and Mr Stevens in November 2014 referred to the launch of Benzac (see below) and said that 'Wider national and possible international distribution is expected to follow through 2015'. In an announcement on 18 November 2014, Mr Wilson was quoted as referring to Galderma

(or possibly its parent Nestlé) as a 'global giant' (Exh 157). Several other announcements referred to Galderma, the Galderma Agreements or Benzac in similar terms.

177 Often, Galderma was mentioned in announcements because of Quintis's practice of including standard wording describing the company or its products at the end of announcements about other matters. For example, on 2 September 2014 an announcement of the resignation of a director concluded with a description of the company and its activities under the heading 'ABOUT TFS' which included (Exh 121):

> [I]n 2014, TFS completed its first commercial harvest of its Indian sandalwood plantations and, via its 50% subsidiary Santalis Pharmaceuticals Inc., entered into a supply agreement for pharmaceutical grade oil with Galderma, a leading global dermatology company.

178 A similar statement appeared at the end of all of the Quintis market announcements that were in evidence that were made between 29 August 2014 and 22 March 2017. The exact wording used above was in all the announcements from about mid-2014 to mid-2015. The wording then changed, but not in any material way. Some of the revised wording will be mentioned at the appropriate chronological points below.

Benzac is launched

179 On 3 November 2014, Quintis announced to the market the launch of Benzac as follows (Exh 151):

> **Launch of Galderma's new acne products**
>
> TFS Corporation Limited ('TFS', ASX: TFC), the world's largest owner and manager of commercial Indian sandalwood plantations, today reported that Galderma will launch its Benzac® Acne Solutions, containing TFS's Indian sandalwood oil, at the end of December 2014.
>
> At a media launch in New York, Galderma announced that the new over-the-counter acne treatments are expected to hit store shelves in the USA on 29 December 2014 and be available online in the USA from 2 January 2015. The products feature a three-step regimen including a foaming cleanser, spot treatment and blemish-clearing hydrator.
>
> [Images of product packaging]
>
> Galderma is a global dermatology company, wholly owned by Nestle, committed to delivering innovative medical solutions to meet the needs of people throughout their lifetime, while serving healthcare professionals around the world. The company has 33 wholly-owned affiliates and a worldwide network of distributors, more than 4,500 employees and an extensive product portfolio available in 80 countries. Galderma operates as the pharmaceutical arm of Nestlé Skin Health S.A.

180 It seems that Galderma launched the products so described in the US on 5 January 2015. On 8 January 2015 Quintis announced the US launch of Benzac as follows (Exh 185):

> TFS Corporation Limited ('TFS', ASX:TFC) confirms Nestle-owned international dermatology company Galderma has officially launched its Benzac® Acne Solutions over-the-counter acne regimen in the United States, which contains TFS's pharmaceutical grade East Indian Sandalwood oil as the key product differentiator.
>
> [Galderma] is releasing Benzac® through major US retailers nationwide (Target, Walgreens and Rite Aid Pharmacy); online retailers such as Amazon.com and Benzac.com; and through social media aimed at the youth market.
>
> 'There are up to 50 million acne sufferers in the United States alone, so this is a huge potential market for Benzac®, TFS, Santalis and our pharmaceutical grade East Indian Sandalwood oil,' said TFS Chief Executive Officer Frank Wilson.
>
> 'If Benzac® can tap just a portion of this US$4 billion market, and we have every expectation that it will given Galderma's enthusiasm about [the] efficacy and appeal of the product, then we expect the launch today will be a significant milestone for TFS and Santalis, our joint venture partner who helped develop the product.

181 Again, Mr Wilson was quoted as referring to Galderma's 'extensive product portfolio available in 80 countries' and the 'worldwide commercialisation' of current and future OTC products of Santalis said to have been contemplated by the licence agreement. He also mentioned that Quintis's pharmaceutical grade EISO was 'currently selling for USD$4,500 a kilogram' and said that 'The launch of Benzac® with East Indian Sandalwood Oil is an important first step in realising a number of significant global opportunities in the pharmaceutical industry…'.

Announcements about Galderma and Benzac, January to August 2015

182 Quintis continued to make numerous announcements to the ASX in 2015 which referred to Galderma, the Galderma Agreements, or Benzac. Many of these were by way of the standard wording at the end of every announcement that is described above. But there were also numerous specific mentions. For example, on 26 February 2015 when Quintis announced its results for the second half of calendar year 2014 to the market, the launch of Benzac and 'orders to date of over one tonne' of EISO were in the highlights at the top of the page.

183 A comment attributed to Mr Wilson was that other revenue sources were 'starting to be complemented by revenue generated from the supply of sandalwood oil, particularly pharmaceutical grade sandalwood oil to Galderma'. Mr Wilson is quoted as saying that Quintis had also been 'encouraged by the early progress of our landmark agreement to supply pharmaceutical grade Indian sandalwood oil to Galderma with orders ahead of expectations' and '[n]ew orders received from Galderma in the last few weeks provide a positive signal for

the growth potential from this new sector'. Mr Wilson also referred to a 'full marketing and advertising campaign' and 'planned additional roll out across stores in the US'.

184 An investor presentation (also dated 26 February 2015) of the same half year results had Benzac product packaging on the cover, and again on a page to mark the 'Q&A' part of the presentation. It was presented by Mr Wilson and Mr Stevens. A point made near the beginning of the document was that 'Galderma's Benzac® acne products launched across the US in December 2014 with oil orders running ahead of expectation'. The launch was the first thing mentioned in the Business Overview section, including that 'Orders from Galderma now total more than one tonne of oil, with orders running ahead of expectations'. A full marketing launch expected to reach 30,000 stores was said to be imminent. Galderma or Benzac were mentioned several times in a section emphasising the potential of the dermatology market for Quintis's sandalwood oil.

185 Galderma had not exercised the options to license eczema and HPV products by the originally agreed end date of 31 January 2015. It seems from email exchanges between Mr Wilson and Dr Castella in March 2015 that the date had been extended by six weeks. But it was not exercised before that extended date, and on 17 July 2015 Galderma advised ViroXis and Santalis (by email from Shanin Bechstein, a member of Galderma's staff working in business development) that Galderma did not intend to exercise the option over either product, although it was 'open to re-visiting this topic in the future if there is an ability to have a different cost structure'. There is no market announcement of Galderma's decision not to exercise these options in evidence. Given the apparently comprehensive coverage of Quintis's announcements about Galderma during this period, I infer that none was made.

186 On 29 April 2015, Quintis announced the launch by Galderma of a social media campaign to promote Benzac on Instagram. This announcement said that Benzac was stocked in 23,000 stores in the US, including named major retail chains.

187 An investor presentation which Mr Stevens gave on about 28 May 2015 contained several references to Galderma or Benzac, including the price of US$4,500 per kg, the launch of Benzac and its stocking in 23,000 stores in the US, and confirmation by Galderma of the extension of the Benzac range with the addition of a new product 'expected to launch in Q3' (Exh 254).

188 Galderma and Benzac were mentioned a number of times in announcements made on 31 August 2015 on the publication of Quintis's full year results for FYE 2015, in its Annual Report released on 12 October 2015, and in presentations at its Annual General Meeting held on 13 November 2015. There is no point in quoting those mentions as they are similar to those quoted above.

189 Set out at [177] above is standard wording that appeared in almost all of Quintis's market announcements. Starting with the announcements of 31 August 2015, the wording changed slightly: first, to remove the reference to Santalis as a 50% owned subsidiary, which it no longer was (see next section); and second, to add a reference to Galderma's parent company, Nestlé. I do not suggest that these changes are material, but it is worth setting the revised wording out here as a reminder of this consistently reoccurring aspect of the company's announcements during the relevant period:

> In 2014, TFS completed its first commercial harvest of its Indian sandalwood plantations and, via its subsidiary Santalis Pharmaceuticals Inc., entered into a supply agreement for pharmaceutical grade oil with Galderma, a leading global dermatology company wholly owned by Nestle.

Quintis acquires 100% of ViroXis and Santalis

190 On 18 June 2015, Quintis announced to the market its acquisition of both ViroXis and ViroXis's interest in Santalis. The announcement said (Exh 266):

> The acquisitions will extend TFS's vertically integrated strategy from 'soil to oil' to 'soil to oil to shelf' as ViroXis and Santalis are well advanced in the formulation, testing and commercialisation of various dermatology products containing TFS pharmaceutical grade Indian sandalwood oil, including the Benzac® products which were successfully launched by Nestle-owned Galderma earlier this year.

The announcement made several further mentions of Benzac and Santalis's agreement for the supply of Quintis sandalwood oil to Galderma.

191 Quintis completed this acquisition of Santalis and ViroXis on 4 August 2015. It acquired 100% of the shares in ViroXis and the 50% of the shares in Santalis which it did not already own. From that time, the board of directors of ViroXis and the board of Santalis were each comprised of Mr Gooding and Mr Wilson. From that time on, Dr Castella and Mr Clements were not members of these boards.

Mr Wilson's responsibilities as Managing Director after the acquisition

192 It is convenient at this point to record some evidence about Mr Wilson's responsibilities as an officer of Quintis, at least from the time that the acquisition of Santalis was completed. This is relevant to the first issue described at [58] above, as to Mr Wilson's duties and responsibilities as Managing Director of Quintis.

193 Mr Matthys gave specific evidence about Mr Wilson's responsibilities for Quintis Board meetings in 2016 and 2017 in his first affidavit sworn on 15 November 2018 (**JM1**). He said a board pack was compiled by Mr Wilson and his executive management team and emailed to the Board either by Mr Wilson's personal assistant, Cris Italiano, or by the company secretary, Simon Storm. The board packs 'contained information and reports concerning the business affairs and operation of the company' and generally included the Managing Director's written report, a 'Santalis report prepared by Santalis' and other documents. The information in them (JM1 para 11):

> included information about significant agreements or contracts, information about the likely effect that this information was likely to have on Quintis' outlook, and whether external legal or other professional advice was required. The information also often formed the basis of discussion amongst members of the Board.

194 Mr Gooding's evidence was largely consistent with this, although he said that the board packs were usually prepared by Mr Storm or by Mr Stevens, with Ms Italiano assisting in collation. Mr Gooding said that the Santalis reports were from Dr Castella. Mr Wilson would sometimes give Mr Gooding a draft of the Managing Director's report for comment and Mr Gooding said that his comments were 'largely editorial and made for the purpose of ensuring that the contents of the report were appropriate and informative' (Exh 15 para 20). According to Mr Gooding, normally at Board meetings 'Mr Wilson spoke to his Managing Director's report and matters of interest to the board were then discussed' (Exh 15, para 21).

195 Mr Groppoli's evidence about the documents provided for Board meetings was similar, but he also gave evidence more directly that it was 'Mr Wilson's role and responsibility as Managing Director and CEO to … select matters to be brought to the attention of the board through his attendances at board meetings and the preparation of an MD/CEO report that was included in the board pack for every board meeting' and to 'inform the board of matters affecting the company's commercial position through his attendances at board meetings and the preparation of an MD/CEO report that was included in the board pack for every board meeting' (Exh 16 paras 21.1, 21.2).

196 Mr Stevens' evidence relevant to the point was as follows (Exh 19, para 7):

> As managing director, Mr Wilson was the most senior executive of Quintis and his primary responsibilities included the management of the operations and the resources of the Quintis group. The senior management team of Quintis reported directly into Mr Wilson. As CEO, Mr Wilson was the main point of communication with the board of directors. It is my understanding that Mr Wilson was a director of all the companies within the Quintis group.

197 Specifically in relation to Santalis, Mr Matthys's evidence was that the Board was informed about the management and affairs of that subsidiary by way of verbal reports given by Mr Wilson during Board meetings, by way of the Managing Director's reports prepared by Mr Wilson and circulated in the board packs, and by way of written reports prepared by Dr Castella and circulated in the board packs. Ms Franklin's evidence as to how the Board was kept informed about Santalis was similar, although she also said that Dr Castella and Mr Clements would prepare reports on the Santalis Pharmaceutical Division and that Dr Castella would provide verbal updates when he attended Board meetings. Mr Gooding's evidence was that Dr Castella's monthly report on Santalis was taken as read, but that if the directors had any questions Mr Wilson would usually answer them (unless they were financial, in which case Mr Stevens usually would answer). According to Mr Groppoli, Mr Wilson's responsibilities as Managing Director included to monitor and inform the Board of matters affecting Santalis's commercial position, prospects and performance, which he did at Board meetings as well as in his Managing Director's reports to the Board. Mr Kay gave broad evidence to a similar effect.

198 Dr Castella's evidence was that following Quintis's acquisition of Santalis, he reported to the board of Santalis which was composed of Mr Gooding and Mr Wilson. He said that his direct reporting line was to Mr Wilson and that he did not otherwise report directly to any other employees or directors of Quintis regarding the day-to-day management and operation of Santalis. The exception to this was when he attended Quintis Board meetings when, he said, he would orally present information contained in the written reports on Santalis which he had assisted in preparing and were contained in the board packs. Dr Castella's evidence was that he regularly communicated with Mr Wilson by telephone and email. It will be seen that Mr Wilson relies on evidence as to an asserted change in these arrangements in late 2016, when Mr Coetzer was introduced as the primary conduit of communication between Quintis and Santalis. I will consider that below, but subject to that, Dr Castella's broad evidence that he

reported to Quintis through Mr Wilson (save when he attended Board meetings), was not seriously challenged and is borne out by the course of communications described below.

199 Mr Wilson accepted in cross examination that if there was some significant or important matter to do with the business of Quintis, Santalis or ViroXis then he would report that to the Board and that these matters were part of his responsibilities and duties.

200 As to the authorisation and approval of public statements by Quintis, most pointedly releases of information to the ASX, the evidence of Quintis officers other than Mr Wilson was consistent that it was a collective responsibility of the Board to consider and approve ASX releases. Unsurprisingly, Mr Wilson was involved in that. Mr Gooding's evidence was that FTI Consulting would usually prepare first drafts of ASX releases but Mr Groppoli's evidence was that Mr Wilson would usually draft ASX announcements in the first instance in conjunction with Mr Stevens and Mr Storm. Mr Kay's evidence was that announcements were typically drafted by Mr Wilson and Mr Stevens or internal or external lawyers. FTI Consulting would assist with the drafting and review of most of Quintis's major announcements. Mr Stevens said that he would sometimes draft ASX announcements, that FTI Consulting would sometimes draft them, that Dr Castella would draft them if they were about Santalis, and that Mr Wilson and Mr Storm would occasionally do the drafting depending on the subject matter.

201 Mr Wilson's evidence in cross examination was that almost invariably, Mr Stevens would draft ASX releases in conjunction with FTI Consulting, and they would then be reviewed by Mr Wilson and Mr Gooding as the Non-Executive Chairman. He accepted that he 'would have approved the ASX releases that went out' and that if there was anything in them that was not accurate, he would correct that if he picked it up.

Concerns about the viability of Benzac

Galderma unhappy about Benzac sales

202 On 5 June 2015 Mr Wilson spoke to Dr Castella about Galderma and reported on that by email to Mr Gooding, Mr Stevens and others. Included in the 'main takeaways' as Mr Wilson's email put it were:

> 1. Galderma ('G') are not happy with level of sales to date and have indicated their first year target is up to $40m pa not the $22m which Santalis thought. They are happy with the customer feedback from those who are using the product. So the product works. They think that their price point is too high compared to [Neutrogena] ?? and to get sales at this price they need to spend

more marketing/advertising on educating customers that the active benefits of EISO are worth the extra cost of the Benzac product. Good news is their sales targets are much higher than we thought and we can expect even more focus on the benefits of EISO in their marketing and advertising going forward.

…

3. Nestle putting pressure on G to reduce their COGS in all areas and may bring manufacturing in house. No mention of price of oil.

…

5. G have renewed interest in introducing EISO to their Benzol Peroxide acne products and have asked for all the research material again.

6. G are intending to launch Benzac in Canada and China in 2016. Getting the product approved as being China compliant is the only hold up. Plan to launch the spot treatment first in China rather than the pack.

COGS stands for 'cost of goods sold'. The email also reported positively on Galderma's possible development of eczema and wart products.

203 The date of Galderma's last order of EISO is not entirely clear from the evidence, but it appears that no more EISO was ordered by Galderma from, at the latest, mid-June 2015. It is also not entirely clear from the evidence how much EISO Galderma ordered under the Galderma Agreements. At most, it ordered approximately 1,222 kg between March 2014 (the date of its first order) and mid-June 2015.

204 It appears from an email from Mr Clements to Mr Wilson (dated 20 October 2015) that in August 2015, Galderma raised the subject of reducing the quantity of EISO used in Benzac, but by September proposed to conduct a 'dosage study' and 'additional assays' to ascertain the effect of a reformulation. This was mentioned at a Quintis Board meeting on 26 August 2015. In the board pack that was prepared for that meeting, there was a bullet point under the heading 'Strategic Matters' that said 'Galderma had spent approximately $25m on advertising and marketing so unlikely they would walk away from their association with us'. It also said that 'oil demand from them [Galderma] was more than they initially indicated with all our supply to June 15 taken by Galderma - they will provide their forecast demand in November 2015'. But as noted below, they never did.

Galderma seek a price reduction - August to September 2015

205 According to the evidence of both Mr Wilson and Dr Castella, on 10 August 2015 they attended a meeting with Galderma representatives, including Miles Harrison, Vice President & General Manager of Galderma's US 'Self-Medication Business'. The meeting was at Galderma's offices

in Fort Worth, Texas. Mr Wilson's evidence in cross examination was that he travelled to Texas to meet with Galderma people. Mr Clements may also have been there.

206 At the meeting, the Galderma representatives told Mr Wilson and Dr Castella that Benzac had not been meeting sales projections. According to Mr Wilson's evidence, Mr Harrison said that he was not interested in a natural product unless it could compete on price with other OTC acne products. Mr Harrison said that unless Santalis could help him reduce Benzac's COGS by a reduction in the price of the oil, or a reduction in the concentration of oil used, the formulation of Benzac using Quintis's EISO had an uncertain future. In cross examination Mr Wilson summarised Mr Harrison's attitude as being that unless there was a reduction in the COGS, which was only really going to come from the price or concentration of Quintis's oil, then he thought the Benzac product had 'a bleak uncertain future'. According to Mr Wilson's affidavit, he responded by saying that Quintis would look at any options that would help Galderma increase its sales as long as it was a 'win win' for both parties, and said that there had to be some benefit for Quintis in any changes to the arrangements with Galderma.

207 Dr Castella's evidence in cross examination about this meeting was not materially different from Mr Wilson's. He said that the fact that Benzac was 50% more expensive than competing products was 'definitely the thing that they gave us', that is, what the Galderma representatives said at the meeting.

208 Mr Wilson reported on this meeting to Quintis's Board in a memorandum dated 23 August 2015 (Exh R0020). The Executive Summary in the memorandum was:

> My recent trip to meet the Galderma executive team in Fort Worth has fortified my view of the huge potential market for us in pharmaceutical and cosmeceutical markets, and the wonderful opportunity we have to expand our OTC product range both within and outside Galderma. But it has also emphasized the need for me and TFS to be more concentrated on exploiting and developing existing and new markets rather than being concentrated on raising capital through our various … programs … Based on my conversations with the Galderma executives it is very clear that the OTC market is potentially enormous but it is cost driven as the market is crowded (acne in particular). It is also very clear that one breakthrough RX product would be a game changer in pricing and market penetration for us, and we should concentrate our pharma spend on getting our best shot on goal (eczema) accelerated through the RX program.

209 Mr Wilson's more detailed report in the body of the memorandum said that Mr Harrison (who was 'clearly the boss' of the relevant division at Galderma) had made it clear that 'Benzac was not performing to his expectations and he blamed this primarily on the fact it was 50% more expensive than his competitors acne products'. The memorandum went on to say:

> EISO is their major COGS in Benzac and they are looking at ways to reduce this through price reductions and or concentration reductions. I expressed the view that we were keen to help them achieve their aggressive growth targets and we would consider all levers (price, concentration, royalty) providing there was a quid pro quo on volume, take or pay, and branding opportunities on their packaging and other OTC product opportunities within Galderma. It was a very productive meeting and I left with the view that if we adopt a commercial attitude the opportunity to penetrate much further within Galderma was readily available.

210 It referred to some steps Mr Harrison wanted to take to boost the marketing of and awareness of EISO and said:

> Having an industry leader like Galderma pushing EISO so hard is tremendous free advertising and marketing for us and I believe some element of price reduction with volume and royalty tradeoffs, and the inclusion of our name and brand on packaging is worthy of consideration, pending better offers from others. The key going forward is to get closer to Miles as he is the decision maker.

211 Despite the concerns Galderma had raised about Benzac, in announcing Quintis's profit for FYE 2015 to the market on 31 August 2015, Mr Wilson was quoted as saying that ViroXis and Santalis had 'already successfully licensed one product containing TFS's pharmaceutical grade Indian sandalwood oil, Benzac' which was 'distributed to around 30,000 stores in the US and was recently voted "Best Acne Treatment" by HEALTH magazine' (Exh 310). Similarly positive messages were conveyed in the announcements in October and November 2015.

212 A presentation by Galderma to Santalis personnel dated 18 September 2015 is in evidence, which indicated that sales of Benzac products in the US had not met expectations. The presentation indicated that Benzac sales would be discontinued if they did not increase at least threefold, and noted that there had already been discontinuations of products at various chain stores. The presentation suggested that the retail price was a 'major barrier to success' and said that for the product range to be a 'sustainable financial proposition', COGS would need to reduce by at least 50%. It noted proposals to reduce cost by 46% in order to help achieve the necessary increase in sales, including a rebate of US$2,477 per kg commencing on 1 October 2015. Galderma was not, however, requesting any reformulation of the product at that time, although it did indicate that by the first quarter of 2016, a 'volumetric research study could indicate future discussion'. It also indicated as potential benefits for Santalis the potential for international expansion (specifying Canada, Asia, the Middle East and South America) and the potential to add Quintis's and/or Santalis's logos to the packaging of Benzac from July 2016.

213 Dr Castella attended this presentation. According to him, he sent a copy of the presentation to Mr Wilson, and Mr Wilson accepted in cross examination that he is likely to have received it

shortly after Dr Castella did, although he had no specific recollection of having done so. There is no evidence that Mr Wilson passed the information in the presentation on to the Board.

Santalis proposes a price reduction to Galderma

214 On 23 September 2015, Dr Castella sent an email to Mr McCrea (who, according to his email signature, was responsible for 'Business Development North America and Aesthetics and Correctives GBU of Galderma'), copied to Mr Wilson. The email made a proposal which, Mr Wilson confirmed in cross examination, was in response to the presentation of 18 September 2015. The proposal included a rebate of US$2,477 per kg effective from 1 October 2015 'until the introduction of mutually agreed newly developed lower EISO concentration formulations that achieve COGs targets'. Santalis was to work with Galderma to establish such new formulations and to conduct 'additional performance testing to support additional marketing claims'. The email also proposed other measures which seem to have been intended to promote ongoing demand for Quintis's EISO, including the exercise by Galderma of the options to licence HPV and eczema products. Dr Castella also proposed co-branding, that is, putting TFS's brand on Galderma's products that contained EISO. He proposed that subject to successful development of new formulations that met the COGS objectives, Galderma would commit to the launch of EISO containing acne products in markets outside the US, with China as a priority. Mr Wilson helped Dr Castella produce this proposal.

215 Mr McCrea responded to this email on the same day saying that he had received the email and would 'discuss internally and get back with you'. Mr Wilson responded directly to Mr McCrea: 'Thx Scott looking forward to working with you closely on all this. Seems like we are creating a win win all round under this proposed arrangement'.

Mr Wilson meets Mr Harrison of Galderma - October 2015

216 Nearly one month later, on 20 October 2015, Mr Clements sent a detailed email to Mr Wilson concerning a meeting which was to take place with Galderma representatives the following day. From the email it appears that Galderma had not come back to Santalis in relation to its proposal. Included in the 'talking points' Mr Clements proposed for the meeting was that there had been 'no communication even upon multiple requests for their input which we all agreed was needed to move on'. The email summarised another point to be made at the meeting as 'Paul sent the EISO cost proposal to Scott on September 23rd. No formal response to date. DO THEY HAVE AGREEMENT ON THE PROPOSAL'.

217 Mr Wilson's evidence was that he was involved in further discussions in late 2015 with Dr Castella and Mr McCrea about the Benzac product generally. It seems from an email from Mr Wilson to Mr McCrea on 22 October 2015 that Mr Wilson did attend a discussion with Galderma representatives on about 21 October 2015, which must have been the discussion for which Mr Clements' email of 20 October was preparation. Mr Wilson said in cross examination that he could not recall attending the meeting, but he did not resist the proposition that he did attend. According to a report he gave to the Board, he was due to meet Mr Harrison in Texas on Sunday 25 October 2015, but it is not clear that this was the same meeting as the discussion with Mr McCrea.

218 There is little evidence as to what was discussed at either meeting (assuming there were two), beyond Mr Wilson's reference to the discussion with Mr McCrea as a 'frank and open' one and a summary he gave about discussion of Rx approvals. Although that latter subject does not appear to relate directly to Benzac, the talking points which Mr Clements gave Mr Wilson were comprehensive, and seemed to include the question of a quid pro quo for a discount on EISO used in Benzac, as follows: 'Please remember we reduced the Royalty rate from 10+% to 3% because of the EISO price - Now they want to half the oil price - They need to give us something significant for this trade off'. The obvious inference, which I make, is that the relationship between Quintis, Santalis and Galderma, including the future use of Quintis's EISO in Benzac and the price of that EISO, was raised in the discussion(s) which Mr Wilson had with Galderma representatives towards the end of October 2015.

219 It would seem that at that point or at some time afterwards Mr McCrea foreshadowed that Galderma would be sending a letter containing revised terms for the arrangement between Galderma and Quintis, because in an email to Mr McCrea on 12 November 2015 (not copied to anyone else) Mr Wilson asked him to 'send me a draft of the letter first as how we approach this is sensitive to other customers and the optics are very important'. According to Mr Wilson's affidavit, by 'optics' he was referring to the effect that a rebate may have on existing and future customers for EISO. According to Mr Wilson, the 'discussions with Galderma about COGS and concentrations continued and were left pending the outcome of a reformulation study to test the efficacy of reduced oil concentrations in Benzac' (FW para 9).

Quintis's 2015 Annual General Meeting - November 2015

220 Mr Wilson and Dr Castella gave a presentation to the 2015 Annual General Meeting of Quintis, which was held on 13 November 2015. Despite Galderma's concerns as described above, the

presentation highlighted what it called the 'successful launch of Benzac® in the US'. It included a comment attributed to Mr Harrison as follows (Exh 342):

> Oil to US drug market - Acne OTC - 'Benzac was successfully launched this year into the US market, the largest teen acne market in the world. Awareness of the brand is growing fast and Galderma is supporting it in 2016 with a full marketing plan'

221 The acquisition of Santalis and ViroXis was also mentioned and was said to have a 'clear strategic rationale' which includes to provide 'a direct contractual and operational relationship with pharmaceutical majors'. Dr Castella's part of the presentation included a comment that Quintis was 'pursuing a high speed to market and lower cost commercialization strategy' which includes 'immediate OTC/retail strategy (that is, Galderma's Acne treatment products)' (tab 18).

222 The chairman's address to the annual general meeting which was also released to the ASX included the comment that Quintis had (tab 19):

> worked with its end market partners to establish high value uses and sales growth for our oil. In the year, our pharmaceutical grade Indian sandalwood oil was exposed to the largest teen acne market in the world, the United States, when the Nestle-owned international dermatology company Galderma officially launched its over-the-counter Benzac Acne Solutions regimen there.

Galderma forecast - November 2015

223 Galderma was required under the its supply agreement with Santalis to submit a written binding forecast to Santalis between 1 November and 15 November showing its requirements for EISO for the following calendar year. Galderma did not submit any binding forecast and so there was no commitment by it to purchase any EISO for the calendar year 2016. Although, as discussed immediately below, Galderma sought to defer delivery of binding and non-binding forecasts.

The draft letter about discounts and the 'final' Discount Letter

224 At trial, a great deal of time was spent on the question of whether Mr Wilson knew about a letter from Galderma to Santalis dated 25 January 2015 (it would seem that the year should have read '2016') concerning, among other things, a discount in the price of EISO (**Discount Letter**). Each party urged on the Court an answer to that question which reflected poorly on the credit of the main witness for the other party. In short, ASIC contended that Mr Wilson did know about the letter, and concealed it from the Board, and Mr Wilson contended that he did not know about it because Dr Castella had concealed it from him.

225 In the case of each of the witnesses, if findings adverse to them were to be made, the implications for their credibility would be twofold. First, they would have been found to have given false evidence to the Court in this proceeding. Second, at around the time of the letter (February 2016), they would have concealed important matters from persons to whom they should have reported: in the case of Dr Castella, concealment from Mr Wilson; in the case of Mr Wilson, concealment from the Board. The matters were important because, at the very least, if the Discount Letter did record a binding agreement with Galderma, the effective price of Quintis's EISO would have dropped by nearly half.

Galderma proposes a discount - November 2015

226 On 18 November 2015, Mr McCrea sent Mr Wilson a draft of the letter which Mr Wilson had mentioned in his email to Mr McCrea of 12 November 2015. The draft letter was addressed to Mr Wilson alone. It was expressed to 'outline in writing Galderma's proposal with respect to the partnership going forward', the partnership, that is, with Quintis and Santalis. There were three parts to the proposal. The first was that there would be a discount of US$2,477 per kg on the price of EISO, which was to take effect from the date of the letter until the commercial launch of reformulated versions of the Benzac products. The second part was that Galderma could cancel current purchase orders for EISO and would not have to deliver a binding forecast for the calendar year 2016 and non-binding forecast for 2017, 2018 and 2019 under the supply agreement with Santalis until the end of March 2016. The third part was that Santalis would conduct a clinical study on the effectiveness of EISO at treating acne at 0.1% and 0.25% product concentrations (both apparently reduced from the then current concentration of EISO in Benzac). The draft letter concluded by saying:

> Galderma shall evaluate the EISO Clinical Study Information along with Galderma's analysis of the long-term financial viability of Benzac and any other factors deemed appropriate by Galderma to determine Galderma's position with respect to the future of its partnership with TFS and Santalis relating to the Benzac brand. Galderma will provide TFS and Santalis notice of its position on or about March 31, 2016.

There was a space for Mr Harrison to sign the letter on behalf of Galderma but, consistently with its status as a draft, this was left blank.

227 Senior counsel for ASIC asked Mr Wilson in cross examination whether there was any way to read that paragraph other than Galderma putting Santalis and Quintis on notice that it was thinking about cancelling the Galderma Agreements. Mr Wilson took that as a rhetorical question and disagreed with it. He said 'I think it was putting us on notice, as they had done in

August, that the future of Benzac was uncertain, problematic, and I think I reported that accurately to the board' (ts 532). Mr Wilson sought to characterise it as Galderma putting a proposal to Quintis for cheaper EISO and clinical studies and the cancellation of two purchase orders. A little later Mr Wilson appeared to accept that Galderma was saying if 'you do all of these things, we will take into account whatever we choose to take into account … And then we will tell you what our position is with respect to the future of the partnership' and he said that was 'commercial bullying' (ts 533). But he rejected 'absolutely' that the only way to read the paragraph was that Galderma was putting Quintis on notice that it was thinking about terminating the contract.

228 This is an example of Mr Wilson taking improbable positions in cross examination. The question asked by the cross examiner was carefully phrased. It did not suggest that Galderma was going to cancel the Galderma Agreements, only that it was thinking about it. It was asked several times and I am confident that Mr Wilson, an experienced lawyer, understood it. And there is indeed no other reasonable way to read the paragraph. Although the use of the phrase 'the future of its partnership with TFS and Santalis relating to the Benzac brand' might be vague, the follow up sentence with the formal statement that 'Galderma will provide TFS and Santalis notice of its position on or about March 31, 2016' leaves little doubt. Galderma was considering termination of the Galderma Agreements which, given that the HPV and eczema options had not been exercised, related solely to acne and therefore Benzac. That Mr Wilson not only disagreed but said 'I absolutely reject that' did not reflect well on his credibility.

229 In any event, Mr Wilson's evidence was that he did not agree to the proposal set out in the draft letter because he did not consider there was sufficient benefit to Quintis in the proposed changes to the arrangements with Galderma. His evidence was that he 'had no conversation with Dr Castella or anyone else to the effect that I agreed with or was willing to accept a proposal along the lines of Mr Harrison's draft letter' (Exh R0025A para 8).

Progress in January 2016

230 On 16 January 2016 Dr Castella sent an email to Mr Wilson which contained positive news. It was headed 'Quick Galderma update' and it reported on a meeting with Mr McCrea that had occurred that week. The report included that sales for the quarter, presumably of Benzac products, had picked up strongly, and that Galderma would likely to be ordering more EISO 'since they cleared out the prior inventory'. Mr Wilson responded saying that was 'fantastic news' (tab 20).

231 There is no direct evidence of any further negotiations, between 18 November 2015 and early February 2016, about the terms of the draft letter from Galderma. But there appears to have been some progress in relation to the proposals contained in it, because in a report to the Quintis Board dated 21 January 2016, Dr Castella and Mr Clements said that 'Galderma have allowed TFS to "co-brand" and will carry the TFS logo on its packaging, starting with the summer release of newly refreshed artwork for the kit and individual products' (Exh 365). Mr Wilson was aware of this because in his report in the same board pack he said 'Refer to Ian's and Paul's report from the recent JPM congress and recent positive news from Galderma re Benzac sales and the use of our logo on their packaging' (p 8828).

232 It is also worth noting that at the same time, Mr Wilson was dealing directly with Galderma personnel; also on 21 January 2016, he emailed James Kenney, Director, Acne of Galderma, saying, 'Paul tells me Benzac sales picked up strongly in the last quarter. Could we have a short call sometime in next 2 weeks to understand timing of the new launch and packaging and plans generally for Benzac (I understand our logo is going on the new packaging)?' (Exh 599). This resulted in a call between Mr Wilson and Galderma representatives on 9 February 2016 which is discussed below.

233 It seems that on 2 February 2016 or thereabouts Mr Clements, at least, had a meeting with Mr McCrea, Mr Bechstein and medical personnel from Galderma and independent contractor, about clinical studies which the contractor was to carry out on Santalis's behalf. This can be inferred from an email exchange between Mr Wilson and Mr Clements on 3 and 5 February 2016.

234 It also seems that Mr Wilson must have told Mr Clements about the draft letter or given him a copy, because in an email on 4 February 2016 (San Antonio time) Mr Wilson asked Mr Clements whether there had been any mention in a meeting with Galderma personnel of 'that crazy letter he [Mr McCrea] drafted a few months ago'. Mr Clements said that there had not.

Galderma sends a revised version of the Discount Letter - February 2016

235 On 5 February 2016 (San Antonio time), however, Mr McCrea sent Dr Castella and Mr Clements by email a revised version of the letter (which was also addressed to Mr Wilson). The covering email was copied to others at Galderma but not to Mr Wilson or anyone else at Quintis. It said, 'Attached is the letter based on our discussions and helps clarify our relationship moving forward. I am assuming you will share with Frank Wilson'.

236 The letter attached to the email bore the date 25 January 2015 (it would seem that the year should have read '2016'). It was a revised version of the draft letter of November 2015. One revision was that the Discount Letter referred at the outset to challenges Benzac had had 'in the marketplace since its launch in late 2014/early 2015 in part because of its significantly higher pricing relative to competitive acne products'. The Discount Letter was no longer expressed to be a proposal but, rather, 'our aligned position'. Another change was that, in consideration for the immediate discount of US$2,477 per kg on the price of EISO, Galderma was to include Quintis's logo on the packaging for the proposed reformulation. Also, the cancellation of Galderma's EISO purchase orders and the deferral of the forecasts required by the supply agreement with Santalis was to be until 'such time as convenient to Galderma', rather than 31 March 2016. The details of the clinical studies were changed. The Discount Letter closed with essentially the same statement about Galderma's position regarding the future of its 'partnership' with Quintis and Santalis concerning Benzac, save that it was to provide notice of its position not by the end of March but 'in a timely manner'. Unlike the unsigned draft letter of November 2015, the Discount Letter was signed by Mr Harrison.

237 The question of whether Mr Wilson saw or otherwise knew of this signed Discount Letter (as distinct from the draft of November 2015, which he accepted he knew about) was the subject of much dispute at trial. Mr Wilson's evidence was that the Discount Letter was not passed on to him and that, to the best of his recollection, the first time he saw it was when ASIC showed it to him at a compulsory examination. His evidence was that he did not authorise Dr Castella to enter into any agreement as appears to have been set out in the Discount Letter.

238 Dr Castella's evidence, however, was that he did send the Discount Letter to Mr Wilson. But he only said that in cross examination; not in his affidavits, and there is no written record of him sending the Discount Letter, for example an email. What was in evidence was an email from Dr Castella to Mr Wilson received in Perth on 6 February 2016 (received at about 8.00 am, and so probably sent on 5 February 2016 San Antonio time) which attached the new packaging artwork with the TFS logo on it, but not the Discount Letter. Dr Castella's email just said 'Please call to discuss'.

239 There was also Mr Matthys's unchallenged evidence that he found a copy of the discount letter at Quintis's offices as a result of a review of documents held at those offices that he conducted after 10 May 2017. The copy of the letter which Mr Matthys annexes to his affidavit is headed 'Email Delivery' so it seems likely that someone received it by email and printed it out. Also

unchallenged was Mr Matthys's evidence that this was the first time that he became aware of the Discount Letter, and that it was never given to the Quintis Board, and that the substance of the agreement it appears to represent - that Quintis would provide a US$2,477 per kg rebate on the price of EISO in return for the inclusion of its logo on Benzac's packaging, and that Galderma could cancel and defer orders and forecasts - was not brought to the Board's attention for its approval or otherwise.

240 It was put to Mr Wilson in cross examination that if he had not received the Discount Letter, he would have been taking steps in the lead up to 31 March 2016 to find out what Galderma was intending for Benzac and the Galderma Agreements. That appears to be a reference to the date in the draft of the Discount Letter which Mr Wilson accepted he had seen in November 2015. The draft said that Galderma would not have to deliver binding or non-binding forecasts until the end of March 2016. The question may, therefore, be robbed of a little of its force by the fact that it was just a draft at that stage and, on Mr Wilson's account, the only version of the Discount Letter which he saw. Mr Wilson's answer implicitly accepted that he was in constant contact with Dr Castella, Mr McCrea and Mr Kenney as to 'what was happening on Benzac'. But the answer also drew a distinction between that and 'what's happening with our agreement', asserting that the latter never crossed his mind. He went on to say:

> probably as we moved into - every month we moved into 2016 where the oil orders were not forthcoming and there were - appeared to be little prospect of them forthcoming. My sort of interest in Benzac, and what was happening with the studies, was - and, you know, Galderma wanting a discount, was sort of diminishing because it was a moot point.

241 I do not accept this evidence. Emails from Mr Wilson to Dr Castella detailed below show that Mr Wilson remained keenly interested in Benzac until at least September 2016.

242 But as for the conclusion to the November 2015 draft of the Discount Letter:

> I didn't regard that as something I had to negotiate to or respond to. I wasn't sort of - even though we were being bullied, I wasn't going to sort of go back to Scott - I don't recall March 31 sticking in my mind. It was very clear that I was going back to Galderma direct and to Paul and Ian, you know, pretty constantly saying, 'Hey, you know, what's going on?' I think we got a very optimistic report from Paul in mid-January and I think I followed that up with conversations or emails to James saying - and to Scott saying, 'Hey, look, when can we discuss reordering?' So that was a rare moment of, I suppose, optimism in January due to Paul's report.

Mr Wilson's 'long and cordial call' with Galderma - 9 February 2016

243 As has been mentioned, Mr Wilson's communications with Mr Kenney of Galderma in late January 2016 led to a telephone conference between Mr Wilson and Galderma representatives on 9 February 2016 (Perth time). Mr Wilson reported on the call to Dr Castella in an email sent also on 9 February 2016. He described it as a 'long and cordial call' with Mr Kenney, Mr McCrea and Adlai Wang (brand director for Benzac). Mr Wilson describes the content of the call as being about Galderma's marketing of Benzac and their likely need for further orders of EISO. There is no reference to the Discount Letter in the email, although he does say, 'I queried Scott on the commercial utility of the proposed clinical trials but played dumb'. Mr Wilson denied in cross examination that this was a reference to the Discount Letter, though. That the re-ordering needs of Galderma were discussed on the call is also confirmed by an email Mr Wilson sent to the Galderma representatives on 14 February 2016 which said that '[a]s discussed' they could meet later 'to have a round table to help finalise all current matters and discuss reordering needs/estimates' (Exh 371).

244 Also put to Mr Wilson in cross examination was the Santalis and ViroXis monthly report to the Quintis Board dated 17 February 2016, in which it was said 'We (Frank, Paul and Ian) have a face to face meeting with Galderma next week to discuss the acne product plans for 2016, which include a new marketing campaign and refreshed packaging artwork that includes the TFS logo' (Exh 374). The implicit suggestion to Mr Wilson in cross examination was that he could not have read this without thinking that there had been some sort of quid pro quo that Santalis had provided in return for the TFS branding going on the product. But his evidence was (ts 577-578):

> Well, as far as I could see, at no stage did Galderma get to the point of offering a quid pro quo that was worth seriously considering giving them a price discount. So, I mean, I didn't - I didn't read - read into this. I don't recall reading this particular report or reading into it what you're reading into it.

245 Mr Wilson again maintained that he did not understand from the Discount Letter of February 2016 that the refreshed packaging artwork including the TFS logo was in consideration for the discount provided for in the letter but, rather, 'there was an ongoing discussion from August 2015 about them getting a price discount and what we would get as a quid pro quo for that, and you know, in February 2016 that was still ongoing with no resolution, no agreement'. But, as the cross examiner then pointed out, the report of 17 February 2016 was indicating that Galderma was going to refresh the packaging artwork to include the TFS logo. It was not

referring to a mere proposal that had not been agreed. Mr Wilson's evidence depended on not accepting the plain reading of the report. When Mr Wilson was squarely asked whether his evidence was that, when he read the Santalis report in that board pack, he did not know why Galderma was going to have refreshed packaging artwork, he retreated into saying that he had no independent recollection of what he thought when he read it.

246 Mr Wilson's oral evidence that the refreshed packaging was still a proposal in mid-February 2016 was also inconsistent with his own comment in his Managing Director's Report in the same board pack, that '[o]ur logo is due to be introduced to their new packaging in June/July in "their summer"' (Exh 377). When cross examined on why he thought Galderma was going to do that, Mr Wilson retreated again into a lack of recollection, saying 'I must have been led to believe that that was happening' (ts 582). He maintained that no quid pro quo for a discount had been agreed to, but he had no plausible answer as to why, then, Galderma were going to add TFS's logo to the packaging, as the following exchange illustrates (ts 582):

> And why were Galderma doing it to your mind?---I don't know. Maybe - look, if sales had have picked up, and continued to pick up, then maybe Galderma - and these are all maybes - maybe Galderma was, you know, keen to - to do it. Maybe they thought it was going to be beneficial to them. But I - - -
>
> Just out of the goodness of their heart?---No, no. They may have felt that putting the logo on our product was going to be helpful to them. I don't know. But it's - - -

No reason as to why the global giant Galderma/Nestlé would have thought it beneficial to have the logo of relative unknowns Santalis/TFS on their packaging is apparent from the evidence.

247 It also appears that Mr Wilson was aware that Galderma had requested clinical trials to support the efficacy of EISO at lower concentrations than the current product, because he referred to the trials in essentially those terms in an email to Mr Kenney on 17 February 2015.

Conclusion regarding the Discount Letter

248 The following matters suggest that Mr Wilson knew about the Discount Letter soon after it was sent on 5 February 2016:

(1) Mr Wilson knew about and had participated in the correspondence from September to November 2015 which included the proposal to Galderma from Santalis and the draft Discount Letter.

(2) The draft Discount Letter was an important proposal from a major counterparty about a key contract (as to which, see my findings in Section VII(3) below) so it is unlikely

that Mr Wilson would have left it to Dr Castella to follow up and finalise the negotiations about it without being personally involved, much less that he would have simply thought it could be ignored, which was the import of his evidence.

(3) Consistently with that, Mr Wilson was engaging directly with Galderma personnel in early 2016. Also, consistently with that, he asked Mr Clements about whether there had been any mention of the draft Discount Letter.

(4) That Mr Wilson had, to Galderma's knowledge, been interested in the discussions that apparently culminated in the Discount Letter is indicated by Mr McCrea's assumption, stated in the covering email for the letter, that he assumed that Dr Castella and Mr Clements would share it with Mr Wilson.

(5) By January 2016, Galderma had agreed to put the TFS logo on the Benzac packaging, and Mr Wilson knew about that. It is unlikely that Mr Wilson was uninterested in how that came about or that he thought it was a gratuitous gesture of goodwill from Galderma. It was, in fact, part of the quid pro quo proposed in the draft Discount Letter in return for the concessions set out in that letter. Mr Wilson is therefore likely to have known that at least some of these concessions had been agreed to.

(6) Mr Matthys found a copy of the Discount Letter at Quintis's offices after May 2017. It is not apparent who had received it if not Mr Wilson.

(7) Mr Wilson participated in a long and cordial call with Galderma representatives to discuss plans for Benzac and repackaging, topics which are the subject of the Discount Letter and which he himself asked to be discussed. The call also covered clinical trials which were proposed in the Discount Letter. The call was held four days after Mr McCrea sent the Discount Letter. It seems unlikely that the Discount Letter was not mentioned or discussed.

(8) Mr Wilson also averted to clinical trials in his email of 17 February 2015. These too were the subject of the Discount Letter.

249 Were the above the only evidence, it would be safe to infer that Mr Wilson knew about the Discount Letter soon after it was received. Other aspects of the evidence, however, lead me to the view that I cannot safely make any firm finding of fact about the matter to employ for the only apparent purpose to which it is relevant, namely the assessment of the credibility of Mr Wilson or Dr Castella. Those aspects are as follows:

(1) Contemporaneous emails dating from as late as 4 February 2016 show that Mr Wilson seemed unaware of any recent mention of the draft of the Discount Letter, as did Mr Clements. It is therefore possible that, as far as they were aware, the discussions about repackaging had somehow progressed independent of the draft letter.

(2) Dr Castella's evidence was that he sent a copy of the Discount Letter to Mr Wilson. But for reasons set out at length elsewhere in this judgment, I cannot rely on Dr Castella's evidence unless it is corroborated by other sources. And the documentary record appears to show that Dr Castella made a deliberate decision *not* to send the Discount Letter to Mr Wilson, but only to send him the proposed project packaging.

(3) The evidence about Mr Matthys's discovery of a copy of the Discount Letter is unhelpfully vague and unsatisfactory. Although it was found in the course of a 'review of documents held at Quintis' offices', it is not clear whether he found a hard copy or a digital copy. There is no evidence about where he found it, including in whose office, in which file, or where else it might have been. Remarkably, the copy of the letter annexed to Mr Matthys's affidavit is obviously not the copy that he found, because it includes a notation suggesting that it was provided by Santalis's American lawyers. The carelessness with which this part of Mr Matthys's affidavit was put together means I put no weight on his discovery of a copy of the Discount Letter.

(4) ASIC did not lead evidence from Mr McCrea or anyone else at Galderma that could have shed light on Mr Wilson's knowledge of the Discount Letter.

250 As a result, the evidence is inconclusive and I do not consider that I can or should make a finding about it for the purposes of the collateral issue of Mr Wilson's credibility. It also follows from the above summary that I will not find that Dr Castella did conceal the letter from Mr Wilson. I place no weight on the Discount Letter as a matter going either to the credibility of Mr Wilson's or Dr Castella's evidence, or to the likelihood that either of them misled each other or the Board in late 2016 or early 2017.

251 In any event, at no time did Mr Wilson report to the Board on the proposal to Galderma which he and Dr Castella prepared in September 2015 which included a US$2,477 per kg rebate on the price of EISO, the draft letter sent by Galderma to Mr Wilson in November 2015 proposing the discount of that amount, or the final Discount Letter of February 2016 (Mr Wilson's position on the last document, of course, is that he did not know about it).

February to November 2016

252 On 26 February 2016 Quintis made an announcement to the ASX headed 'TFS delivers strong first half result - secures new supply agreements to China and India'. A bullet point under the heading 'Highlights' at the start of the announcement referred to '[s]ignificant growth in sales of Benzac®, with royalty receipts tripling in Q2 FY16'. The tripling of these receipts was also mentioned a little further down the page. Mr Wilson was quoted as saying:

> With our existing contracts with Galderma and Lush Cosmetics, I am very pleased to announce that we have now forward sold all of the TFS owned yield from the forthcoming two harvests. We are now in the enviable position of having multiple customers across multiple markets in four different continents and this perfectly illustrates the global demand for Indian sandalwood.

253 On 23 March 2016 Mr Wilson emailed Mr Wang of Galderma asking, in effect, for 'any news' about a 'digital launch' of Benzac and when he had heard nothing by 28 March 2016 he emailed Mr Wang again asking for 'any news' and 'have you just brought proactive?'. Mr Wang replied with information mainly about Galderma's marketing campaign for Benzac. One of the things he said was that '[p]ackaging with the TFS logo would start appearing on shelves around mid-year' (Exh 599).

254 On 13 April 2016 Dr Castella reported to Quintis's Board that Nestlé had announced that they had entered into a joint venture to purchase the Proactiv acne brand. He said that it was not clear how this would affect Galderma US; Nestlé had not bought the brand through Galderma. Dr Castella referred to a contact at Proactiv through whom he hoped to introduce EISO to Proactiv. Mr Wilson referred to this development in his Managing Director's report to the Board in the same board pack as follows: 'The purchase by Nestle of the proactive brand provides a great opportunity for us as proactive does not currently use EISO but is also a threat if Galderma choose to simply replace Benzac with Proactiv. Proactiv sells > $800m pa vs Benzac < $20m'. Dr Castella's evidence was that he discussed the risks and opportunities presented by Nestlé's acquisition of Proactiv with Mr Wilson at the time; Mr Wilson did not contradict this. In early May, Dr Castella asked Mr McCrea whether the acquisition would have any impact on Galderma's plans for Benzac and was told it would not.

255 On 13 May 2016 Dr Castella sent Mr Wilson an email about a royalty report he had received from Galderma and a call he had with Mr McCrea. The report showed sales at about 40% of the levels which would be needed to meet a goal that Galderma apparently had of 600,000 units or $6 million in sales. Because of discounts and expiration charge backs, Galderma reported a

negative royalty, although there was a minimum $125,000 payment due regardless of how sales actually fared. Mr McCrea apparently understood that 'these royalty numbers do not help support the case for doing a more expensive acne study'. Mr Wilson's email response to Dr Castella was (Exh 421):

> Yes I suppose we really need to see the second quarter results because the campaign only started in late March. Got to be careful how we present this as it is too early to be going negative on Galderma as nothing yet in place to replace them. I think line has to be 'expected result in dormant period leading up to new campaign'. But we do need to get our skates on with some traction on other fronts.

ASIC submitted that this response related to the discount for EISO embodied in the Discount Letter but I can discern no express or implied mention of the discount in Dr Castella's email.

256 In cross examination, Dr Castella was asked about a meeting he had in Australia in June 2016. The subject of the questioning was whether he told any of the Quintis officers and staff he met during that visit - Mr Gooding, Mr Wilson, Mr Stevens and Mario Di Lallo, Quintis's Head of Global and Retail Products - about the discount on the price of EISO that was provided to Galderma. Dr Castella gave vague evidence to the effect that he was likely to have spoken to some of those people about that, and that he was sure that Mr Wilson would have told them about it. But I am left with the impression that Dr Castella's evidence here was a mixture of assumption and reconstruction, with very little actual recollection, and I put no weight on it. It was put to Dr Castella that he had concealed the discount from Quintis officers on this occasion, which Dr Castella categorically denied. But there was no foothold in the evidence to suggest that the subject of the discount came up during that visit, so that any occasion for concealment arose. I put no weight in any respect on the cross examination about the visit to Australia in June 2016.

257 On 28 June 2016, Quintis announced to the market that it had executed contracts with a new institutional investor to acquire sandalwood plantations. A statement attributed to Mr Wilson in that announcement said, 'As we continue to expand the markets for our processed wood and oil in international pharmaceutical, fine fragrance, carving and luxury cosmetic markets, these returns will increase further and continue to attract new investors to our plantation products' (Exh 437).

258 On 18 July 2016, Dr Castella reported to Mr Wilson that there had been no word from Galderma since their quarterly royalty report had been received (the one described at [255]

above) and that he would 'ping them to see if there is any change in sales outlook since we last spoke'. Mr Wilson replied (Exh 449):

> Yes keep very close to them as we cannot afford to get blindsided by a sudden departure. The more we can do to extend our relationship duration the better as I actually think that if they can hang in there they will work out that they do have a gem. But they have to go back to the natural angle in my view, not just price. It's a race against time here because as soon as we can get another OTC launched the less we are concerned what they do, and in fact we can then drive the agenda with them more aggressively ourselves.

259 In his Managing Director's Report to the Board dated 22 July 2016, Mr Wilson reported on Benzac and Galderma as follows (Exh 456):

> Mario is in Salt Lake City negotiating with Young Living at the moment. We are hoping for a multi year multi ton contract within the next month at US $4500kg. If Benzac responds positively to the new digital campaign, or more generally to improved marketing this could present a supply problem for us. It is impossible to tell which direction Galderma will take following the purchase of Pro Activ. We need to be prepared for either.

260 In an email on 10 August 2016, Mr Wilson again asked Dr Castella, 'What is the latest with Galderma? Can you stay right on top of them as we can't afford any bad surprises in the next few months until other contracts kick in. What's latest with pro activ discussions as that could be a very nice surprise'. Dr Castella said he has still not heard anything and nothing had changed but he would follow them up.

261 On 21 August 2016 by email Mr Wilson again asked Dr Castella, in connection with Galderma, to 'ride this one very closely as we are very close to being able to absorb bad news, or better still move onto the front foot with them. But we are not there yet and need at least until the end of this year to do this smoothly'. When Dr Castella replied that nothing much had changed and that in a couple of months Galderma personnel would know more, Mr Wilson asked 'Are they still trying to sell it? Are they still planning to do the new packaging with our logo?'. Dr Castella replied that 'the product was made and should be on sale - I'll see if I can get some examples'.

262 On 26 August 2016 when announcing its results for FYE 2016, Quintis said 'TFS has now successfully established a broad range of global customers, including oil buyers Galderma and Lush Cosmetics, across its diverse end markets which means the majority of harvests through to 2021 are now forward sold'.

263 On 31 August 2016 Mr Wilson sent Dr Castella an email with the subject heading 'Galderma' saying:

> One way to buy time is to progress / elongate discussions on a reversion of the brand to us. Contractual and commercial discussions with them would almost guarantee 6-12 months if we worked at their pace and with their bureaucracy unimpeded. Just a thought. We could also use it to sow seeds for further RX deals with them.

ASIC submitted, and I accept, that the reference to a 'reversion of the brand to us' was a reference to the Benzac brand, because there were no other brands to which it could refer. That is consistent with Dr Castella's evidence that he understood that Mr Wilson had 'an idea' that Santalis could continue with Benzac by buying it from Galderma.

264 Set out above at [177] and [189] are two variations of the standard wording about Galderma that appeared in nearly all of Quintis's market announcements during the relevant period. In an announcement made on 2 September 2016, a sentence was added to this, reflecting the content of that announcement, which was that Quintis had signed a supply agreement with Young Living, the 'world's leading essential oil company'. From that time on until 27 February 2017, the announcements in evidence thus contained the following standard wording:

> In 2014, TFS completed its first commercial harvest of its Indian sandalwood plantations and, via its subsidiary Santalis Pharmaceuticals Inc., entered into a supply agreement for pharmaceutical grade oil with Galderma, a leading global dermatology company wholly owned by Nestle. TFS now has significant and multi-year contracts in place with a number of global companies across pharmaceutical, cosmetic and wood markets.

For some reason that second sentence was omitted from an announcement made on 22 March 2017 in response to the Glaucus Report, described below.

265 Mr Wilson's report to the Board dated 20 September 2016 (for a meeting on 29 September) referred to his view that (Exh 504):

> [d]espite a string of significant positive announcements our share price continues to languish and we are still a heavily 'shorted' stock (17th on ASX). The scepticism about us in Australia remains high amongst fund managers due to the legacy MIS issues of the failed forestry companies Great Southern, Timbercorp et al.

266 The report had a section on Santalis which said:

> No decision has been made by Galderma on their commitment to Benzac but their interest in Benzac appears to have diminished after their Pro Activ mega brand acquisition. We have a meeting with the senior marketing Vice President for Pro Activ in October, so the Galderma acquisition is both a threat and an opportunity for us. It is

> worthy of note that Mckinsey identified acne as our weakest opportunity of all our prospective drug candidates, mainly because our oil is more active in the treatment of skin inflammation (the cause of eczema, psoriasis) as opposed to bacteria (the main cause of acne). It is correct in my view that Santalis should be concentrating on RX phase 3 drug approvals over more OTC product launches. We do not need/cannot supply significant OTC oil orders in the next 5 years, whereas drug discovery and consequential product launches fit more neatly into a 5 year time horizon when our supply can match increased demand. RX drug approvals is also where serious value can be added to our TFS valuation and would give us the flexibility to float Santalis as a separate listing in the US. The next 6 months are very important for Santalis as major progress is expected with our FDA trials, and if the trials are successful significant third party interest should follow.

267 Several of Quintis's directors gave affidavit evidence confirming that Mr Wilson's description of the acquisition of Proactiv as both a threat and an opportunity reflected their own understanding of the potential impacts of the acquisition. Mr Gooding confirmed in cross examination that there were 'two ways of looking at it. One, it could have been a positive in that Proactiv may want to use the EISO product. Or secondly, the negative was that it would make an impact on Benzac that would be negative on sales' (ts 296). Mr Stevens considered there were three options - that Nestlé would run with both products, or prioritise Proactiv and discontinue Benzac, or find some way of combining the two (ts 335).

268 A monthly report from Santalis was also included in the Board papers for that month. Galderma and Benzac were not mentioned save for brief references in a list of historical key performance indicators (**KPIs**) connected with the acquisition of Santalis.

269 On 27 September 2016, at the end of an email thread in which Dr Castella had sent Mr Wilson some photographs of Benzac product packaging obtained online from Walmart, which had the TFS logo on it, Mr Wilson said 'Well best evidence we are still alive' (CB 502).

270 Mr Gooding, in his Chairman's report in Quintis's 2016 Annual Report, released to shareholders in October 2016, stated that Quintis had entered into long-term supply agreements with customers in China and India 'which were in addition to TFS's existing supply contracts with oil buyers Galderma and Lush Cosmetics' (CB 508). The report also said that these new forward supply agreements 'supplement the Group's existing oil supply contracts with Galderma in the US …'. The corporate profile in the report named 'Nestle-owned Galderma, a leading dermatology company' as one of Quintis's global customers. Under the heading 'Licensing and Supply Agreement', the report said:

> In February 2014, the Company finalised a landmark deal with global dermatology company Galderma, wholly owned by Nestle, for the supply of pharmaceutical grade Indian sandalwood oil, via TFS's 50% joint venture company, Santalis Pharmaceuticals

> (now wholly owned by TFS). The deal includes long-term supply of TFS's pharmaceutical grade oil at a price of US$4,500 per kg.

271 On 4 November 2016 Mr Clements gave Mr McCrea an update on discussions between researchers from Santalis and Galderma about the potential use of EISO to treat psoriasis, after which the Galderma researcher had requested a sample of EISO to repeat experiments at Galderma. Mr McCrea responded expressing interest in the data and on 7 November 2016 Dr Castella forwarded that to Mr Wilson, noting Mr McCrea's interest.

272 On the same day, there was a meeting of Santalis's board of directors in San Antonio. Mr Gooding and Mr Wilson were there, as well as Dr Castella and Mr Clements. Dr Castella gave some evidence in cross examination that the discount on the price of EISO to be purchased by Galderma was discussed at that time, but it was as least as vague as his evidence about such discussions in June 2016, and I similarly put no weight on it. Dr Castella steadfastly disagreed that he had concealed the discount from Quintis at that time, and given how long it was after the discount was apparently negotiated in February 2016, there is no basis to think that the subject would have come up so that any occasion for concealment arose.

273 In his Chairman's address for the 2016 Annual General Meeting on 11 November 2016, which was released to the ASX, Mr Gooding made reference to Galderma as follows (Exh 527):

> In February, TFS entered into long-term supply agreements with wood buyers in China and India at attractive prices, adding to our existing supply contracts with oil buyers Galderma and Lush Cosmetics. In September, TFS signed a five-year agreement, valued at approximately $50 million, to supply Indian sandalwood oil to US-based Young Living, the largest essential oil company in the world. These agreements mean the vast majority of our harvests through to 2021 are now forward sold.

274 As in 2015, in 2016 Galderma did not submit any forecast to Santalis indicating a requirement for EISO for the following calendar year. As such, there was no commitment by it to purchase any EISO for the calendar year 2017.

275 Mr Wilson's Managing Director's report dated 22 November 2016 which appeared as part of the materials for the Board meeting of that month did not mention Galderma or Benzac. Its discussion of Santalis focussed on clinical trials in relation to conditions other than acne, and recommended that soundings with investment banks begin in relation to an initial public offering (**IPO**) of shares in Santalis in the calendar year 2017.

Mr Coetzer is introduced to Santalis

276 On Friday 25 November 2016, Mr Wilson emailed Dr Castella and Mr Clements to introduce Mr Coetzer to them. Mr Coetzer was copied in, along with Mr Gooding, Mr Stevens and Mr Di Lallo. Mr Wilson told Dr Castella and Mr Clements that Mr Coetzer 'is going to be working with you closely as we discussed in SA. Will let you, Phil and Mario work out your scheduling for the start of regular calls, and mapping out Phil's visit to SA, together with the other plans discussed' (Exh R 44). That first mention of 'SA' appears to be a reference to a Santalis board meeting held in San Antonio on 4 November 2016 at which, according to the minutes, 'it was discussed that a CFO would need to be hired by Santalis… agreed that Phil Coetzer from TFS Perth would work with Santalis' (Exh CB 523).

277 Mr Coetzer's role in relation to Santalis from late 2016 onwards was the subject of a considerable degree of evidence and dispute. This was largely because Mr Wilson sought to portray him as someone whom Dr Castella could have, and should have, told about the termination of the Galderma Agreements, but did not. This was enlisted in support of Mr Wilson's submission that Dr Castella had concealed the termination from everyone at Quintis, including him. It is therefore necessary to canvass the evidence about Mr Coetzer's role.

278 In his Board Report of July 2016, Mr Wilson had said he believed that 'we need to install our own person in the Santalis office to ensure a higher level of oversight and accountability' (Exh 456). At the Santalis board meeting on 4 November 2016, it was agreed that Mr Coetzer was to be enlisted to work with Santalis to recruit a Chief Financial Officer, which was seen as a necessary step before an IPO. Mr Coetzer was to travel to San Antonio to participate in the interview process and the CFO would report to him as well as Santalis's CEO. The minutes recorded that 'Following Mr. Coetzer['s] visit to Santalis, he would function as the primary communication conduit for the companies' (Exh 523).

279 According to Mr Gooding's evidence, Mr Coetzer had been hired in September 2016 as Quintis's Group Financial Controller, and from that time had been attending Santalis board meetings. Mr Coetzer was one of the people who informed Mr Gooding about the management, affairs and operations of Santalis, along with Mr Wilson and Mr Stevens, and Mr Gooding's attendance at meetings of the Quintis and Santalis boards. Mr Gooding accepted in cross examination that 'primary communications conduit' described the role that Mr Coetzer was to play. But then the following exchange occurred (ts 307):

> That is, if there was anything of any significance going on in the business of Santalis that TFS needed to know about, it was to be communicated to Mr Coetzer?---Well, his role was to look at the accounting because the accounting was outsourced and costing a lot of money to see whether a CFO could be hired. He would be responsible for that. And then start to oversee the IPO process if that got going.

280 A little later Mr Gooding said:

> I would imagine he was having telephone discussions with Dr Castella on how they were going with the clinical trials, any other staffing issues that may arise. I think, also, there was suggestions about an additional salesperson being added to Santalis' staff and working on that with Mario. So those sorts of responsibilities would fall under Phil's - would be responsible to Phil.

Then when asked whether it was his understanding that a termination of the Galderma Agreements would have been advised to at least Mr Coetzer, he said 'I would have thought so, or - or advised to the board of Santalis'.

281 According to Mr Wilson's evidence, from the date of the November 2016 Santalis board meeting, Mr Coetzer was to be 'heavily involved' in Santalis's business. Mr Wilson's evidence was that it was his 'understanding that at all times after this all issues concerning the Santalis business, including all issues that arose with Galderma or Benzac, would be discussed by Dr Castella and anyone else at Santalis with Mr Coetzer' (FW para 36).

282 Mr Stevens described Mr Coetzer's contribution in relation to Santalis as limited and specific. As Group Financial Controller, Mr Coetzer reported to Mr Stevens. Mr Stevens recalled that Mr Coetzer was 'asked to do a couple of things for Santalis' (ts 337), namely recruit a CFO and help Mr Di Lallo gain a better understanding of the progress of clinical trials. Mr Stevens confirmed that the mention in Mr Wilson's email of Mr Coetzer working closely with Dr Castella and Mr Clements and having regular calls was consistent with the limited role he described. However when asked whether he would have expected Mr Clements or Dr Castella to advise the termination of the Galderma Agreements to Mr Coetzer, Mr Stevens replied 'Probably, yes' (ts 338).

283 Mr Coetzer's own evidence as to whether he was to be the 'primary communication conduit', in answer to a question in cross examination, was as follows (ts 349):

> Look, certainly not the sole conduit. Primary conduit - we had - we arranged meetings in which we had conversations but certainly the reporting lines did not change and, as far as I'm aware, others still continued to have conversations and communications with other senior executives within the company.

284 Consistently with Mr Stevens' evidence, Mr Coetzer recalled his role in relation to Santalis as limited to finding a CFO for the purposes of an IPO (ts 349):

> And so my focus was about the trials and the ongoing operations within the subsidiary, so I don't believe I covered absolutely everything within the subsidiary. It was a defined purpose.

285 Mr Coetzer said that he formed a good professional relationship with Dr Castella and Mr Clements and he never formed the view that Dr Castella or any other officer of Santalis was concealing anything from him about the business of Santalis. Had the Galderma Agreements been terminated, he would have expected it to have been talked about.

286 In cross examination Mr Wilson himself accepted that Mr Coetzer's evidence that reporting lines had not changed was a 'pretty reasonable summary of … the situation' and he seemed to accept Mr Coetzer's evidence that his role was more focused on the CFO and the IPO for Santalis, albeit not restricted to that (ts 657). Mr Wilson maintained that Mr Coetzer was to be the primary, but not sole point of contact. He accepted that in December 2016 he still communicated with Dr Castella or Mr Di Lallo without copying Mr Coetzer in and that he had conversations with Dr Castella where Mr Coetzer was not on the call.

287 Dr Castella's evidence about all this was difficult to understand. In cross examination he resisted the proposition that Mr Coetzer was to be the 'primary conduit of communication' between Quintis and Santalis after his visit to San Antonio. He said he thought that 'it was a more general concept than that, that he would facilitate communications between the companies and coordinate efforts. There is a lot of communication going back and forward on a lot of different programs'. But his resistance may have been based on an understanding that it was being put to him that he was to report to Mr Coetzer from that time on. Dr Castella said, 'I don't think it meant he was replacing Frank as my direct report line, if that's where we are going'. He nevertheless accepted as probable the proposition that if there was anything of significance that arose in the business of Santalis that required Santalis to advise Quintis, it would be done through the primary communication conduit of Mr Coetzer. He later accepted that, in his words, Mr Coetzer 'was definitely going to be inserted into the business's interaction'. Although, he said, that occurred over time, referring to Mr Coetzer's visit to Texas to interview CFO candidates in January 2017. And, importantly, he qualified it as being more related to financial matters and certainly not matters related to Galderma.

288 In the end, the evidence about Mr Coetzer's role does not advance matters very far. Mr Wilson's evidence that Dr Castella would discuss all issues about Santalis's business with Mr Coetzer is far too general to be given any weight. Those who did give specific evidence about Mr Coetzer's role - Mr Gooding, Mr Stevens and Mr Coetzer himself - emphasised that he was to be focussed on financial, operational and staffing matters and clinical trials. Dr Castella, Mr Coetzer and Mr Wilson himself all said that reporting lines had not changed. In that context there would be nothing unnatural, let alone dishonest, in Dr Castella reporting on a significant commercial development such as the termination of the Galderma Agreements to the Managing Director with whom he had been dealing on the subject for a few years - Mr Wilson - and not to Mr Coetzer. Especially since Mr Coetzer's new role had not been in place for very long by the time of the termination, and he did not visit San Antonio until January 2017.

289 Certainly Dr Castella could have, perhaps should have, told Mr Coetzer about the termination of the Galderma Agreements at least by early 2017. That he did not is consistent with his evidence that Mr Wilson wanted to manage how that information was disseminated. I will have more to say about that when I return to the subject of Dr Castella's credibility in Section VI below.

The termination of the Galderma agreements

Galderma tells Dr Castella that it wants to terminate the Galderma Agreements

290 In 2016 the Thanksgiving holiday in the US took place on Thursday, 24 November.

291 Dr Castella's evidence in his affidavit was that on Monday, 28 November 2016, Mr McCrea telephoned him and said that Galderma did not intend to continue distributing Benzac and accordingly wished to terminate the Galderma Agreements. According to Dr Castella, this was the first time he became aware that Galderma wanted to terminate the Galderma Agreements. Mr McCrea also said that Galderma had excess inventory of EISO which it wanted to sell back to Santalis. (The evidence does not reveal why this was so in view of Dr Castella's report to Mr Wilson in January 2016 that Galderma had cleared out their inventory of EISO, and would be ordering more.)

292 The date Dr Castella gives of this conversation seems to be inconsistent with an email that Mr McCrea sent Dr Castella on Monday 28 November 2016 at 9.37 am in the morning San

Antonio time. According to Dr Castella, he received that email after the conversation with Mr McCrea that had taken place on the same day. The email said:

> Hi Paul
>
> Hope you and your family had a good Thanksgiving. Wanted to see if you had heard back from TFS in purchasing our remaining EISO inventory.
>
> Also, Shanin is trying to set up time to meet at JP Morgan for an Rx update. I'm sure he will be in touch.

293 There are two things about this that seem inconsistent with Dr Castella's evidence. First, if Mr McCrea had already spoken to Dr Castella on the morning of 28 November 2016, after Thanksgiving, it seems unlikely that Mr McCrea would have started the email with the pleasantry about that holiday. It is not the sort of thing Mr McCrea was likely to say to someone to whom he had spoken only shortly before.

294 The second inconsistency is that if Mr McCrea had raised the subject of the repurchase of EISO with Dr Castella only that morning, it is unlikely that he would have asked Dr Castella whether he had heard back from Quintis within what could only have been a couple of hours at most on the same morning. That is made even less likely by the fact that at 9.30 am on Monday morning in San Antonio it was 11.30 pm on Monday night in Perth. Mr McCrea would surely have waited at least until the end of Monday in Texas, being Tuesday morning in Perth, before expecting an answer from Quintis.

295 Dr Castella responded to Mr McCrea's email reasonably quickly at 9.56 am San Antonio time on the same day, 28 November 2016. The reply (copied to Mr Clements and Mr Bechstein) relevantly said:

> Yes, it is an interesting situation since TFS would prefer we buy 'new' oil from them, rather than product already sold. However, I can offer $1,000 per kilo for you[r] inventory, if that is acceptable to you.

296 This suggests that Dr Castella either already had spoken to someone from Quintis about the repurchase of Galderma's EISO inventory, or that he did not see a need to speak to anyone in order to make the offer. Dr Castella's evidence was to the latter effect. His affidavit said that the mention of TFS in the email 'was in fact a reference to the understanding and general principles of TFS based on my dealings with Mr Wilson' (PC1 para 51). In cross examination on the subject, Dr Castella said he thought it was a reasonable assumption to make that Quintis would prefer oil to be bought from them, rather than from someone to whom Santalis had

previously sold it, and from whom it was buying it back. He seized on the cross examiner's suggestion that this was obvious, although at this point there was a long delay between the question and Dr Castella's answer, bespeaking a great deal of hesitation on the witness's part (see [66] above).

297 Obvious though it may be, the idea that Dr Castella took it on himself to make the offer of US$1,000 per kg is not consistent with the inference to be drawn from Mr McCrea's email of 9.37 am on that day, which was asking whether Dr Castella had heard back from TFS on purchasing the EISO inventory. It is open to infer from this that Dr Castella had told Mr McCrea that he would need to check with TFS before he could respond on that point. When asked in cross examination what authority he had to be offering US$1,000 per kg, Dr Castella said 'I think I was just fishing for a price' (ts 184). But the email reads like a firm offer. He conceded he had no authority to make it. He accepted that under the addendum to the supply agreement between Santalis and Quintis, he required the consent of Quintis to make the offer.

298 Dr Castella's evidence on this point was unsatisfactory and this erodes his credibility. It does not, however, go as far as Mr Wilson's submissions made out; they labelled it a lie. It is simply an unexplained and odd gap in the logic of Dr Castella's evidence when considered against the documentary record. What is more important is whether the emails provide a basis to infer that Dr Castella had spoken to someone at Quintis about, at least, the repurchase of EISO, on or before 28 November 2016. But despite the unsatisfactory nature of Dr Castella's evidence on the point, it would not be safe to make that inference. It is quite possible that Dr Castella did make the offer without authority. The price of repurchasing a relatively modest amount of EISO (it turned out to be just over 100 kg) was hardly important in the scheme of things.

299 As an aside, the email of 28 November 2016 copying in Mr Bechstein was the first time that Mr Bechstein was introduced in Dr Castella's first affidavit. He is referred to throughout the affidavit as 'Ms Bechstein'. Dr Castella corrected this in his oral evidence, confirming that Shanin Bechstein is a man. The error is of no consequence in itself, but it does not reflect well on the care that Dr Castella and those responsible for preparing his affidavit took to ensure that it was correct.

300 As I have said, Dr Castella's evidence about the timing and content of the crucial telephone calls at around this time was vague and unsatisfactory. I prefer the sequence of events which appears most likely on the face of the contemporaneous emails I have mentioned. It is unlikely that Mr McCrea would have followed up about the inventory purchase within a couple of hours

or less of having made it. So the telephone conversation that Dr Castella says took place on Monday 28 November 2016 in fact took place on a previous day. It probably took place before Thanksgiving. Otherwise, it is unlikely that Mr McCrea would have asked about Dr Castella's Thanksgiving in the email. It is not necessary or possible to find exactly how long before Thanksgiving it took place; but even if it was only 23 November (the day before the holiday), that would make Mr McCrea's follow up question much more reasonable. I am assisted in making that inference by the fact that ASIC did not call Mr McCrea to give evidence and did not suggest that he was unwilling or unavailable. I therefore infer that Mr McCrea's evidence would not have assisted ASIC in this regard, and more readily find that Dr Castella's timing of the call from Mr McCrea is incorrect.

301 Senior counsel for ASIC pointed out that the emails of 28 November did not speak of any termination of the Galderma Agreements but only of the purchase by Quintis of Galderma's remaining EISO inventory. But Dr Castella's own evidence was that Mr McCrea raised both that subject and the subject of termination of the Galderma Agreements in the conversation which started this sequence of events. And it is unlikely that the subject of repurchase by Quintis of the EISO would have come up without the subject of termination of the contractual relationship also arising. So I find that Mr McCrea did first tell Dr Castella that Galderma wanted to terminate the Galderma Agreements (and sell back the EISO) before Thanksgiving, possibly on 23 November 2016.

302 That finding exacerbates another difficulty with Dr Castella's account of this sequence of events, which I will explain soon below. It is necessary to return to the sequence of events, though. Mr McCrea sent Dr Castella an email on Thursday, 1 December 2016, which said, 'Please see the attached draft document as discussed' (Exh 541). The attached draft document was a draft letter agreement to effect the termination of the Galderma Agreements with both Santalis and ViroXis. The draft was to terminate each of the supply and licence agreements comprising the Galderma Agreements with effect as at 1 January 2017, and required Santalis to re-purchase all that EISO Galderma had on hand for US$1,000 per kg. Dr Castella responded to Mr McCrea's email quickly, saying that he would review the draft document right away and get back to Mr McCrea shortly.

Dr Castella's evidence about the key conversation(s) with Mr Wilson

303 Dr Castella's evidence was that he had a conversation or conversations with Mr Wilson after receiving Mr McCrea's email. (Since neither witness could recall whether there was more than

one conversation, and since nothing turns on it, I will just refer to it in the singular as 'the conversation'). He described that in his oral evidence in chief as follows (ts 80, italics added):

> Now, can I ask do you recall - after receiving that email, do you recall having a conversation with Mr Wilson or conversations with Mr Wilson?---Yes.
>
> And can you tell us what you recall about those conversations at that time?---Well, I would have told him that Galderma was looking - - -
>
> Well, can I just stop you there, Dr Castella. Rather than telling us what you would have told him, doing the best you can - - -?---Okay.
>
> - - - from your recollection, can you tell us what your recollection is of - - -?---Yes.
>
> - - - what you told him and what he told you, doing the best you can?---Okay. *My recollection is that I told Mr Wilson that Scott had called me and told me that they wished to terminate the agreement, that they wished to terminate the agreement at year end. One of the reasons for that was to avoid ongoing minimum payments and other obligations. I explained the document that they sent to us.* We had a conversation about it. One of the items that we discussed was the timing. Mr Wilson ideally wanted the document to not terminate on that date but a later date, but Galderma were not interested in that. And so we discussed, I guess, mechanisms to enable Galderma to have what they wanted with the termination and to give Mr Wilson or Quintis a longer period before the termination would finally be in effect.
>
> Doing the best you can, what did Mr Wilson say to you about that aspect?---We - so my - my response after discussion with Mr Wilson, my response to Scott, to Galderma, was to develop a paragraph that gave them the option to essentially restore the agreement that lasted for the same period of time as the confidentiality agreement, so essentially six months.
>
> Well, that's something you did later. I'm asking you about - - -?---Yes.
>
> - - - the conversation or conversations you had and what Mr Wilson said to you and you said to him, rather than what you did later?---We would have discussed - - -
>
> Again - - -?---Okay. Okay. My apologies.
>
> Sorry, Dr Castella?---We - I recall that we discussed potential methods or strategies for extending the contract. And the conclusion of those discussions was to attempt the option agreement that eventually found its way into the document.
>
> And what do you recall Mr Wilson said to you about that?

304 At that point there was an objection on the basis that Dr Castella had been asked the same question three times and that to ask it again would be leading. The objection was overruled and Dr Castella was given the opportunity to answer the question again, which he did as follows:

> … The conversation included the discussion for the need to provide more time because there is a - or there was a disclosure requirement that Quintis would have to disclose the cancellation of the contract, but at some interval, obviously, after it was concluded. And Mr Wilson was interested in giving us, Quintis, more time before that definitive announcement had to be made. And we - we also discussed potential events that could occur in that timeframe that would help, I guess, with the messaging of the Galderma announcement - or Quintis' announcement of the Galderma termination.

> Now, you said 'potential events'; what did you mean by that or what do you recall being said about that?---So - so some of them, I think, we have just touched on with some of the emails that you've shown me, but we - I guess there were two main thrusts to this. Santalis, in conjunction with Quintis, had been making a very extensive effort to develop other relationships with companies that would market over-the-counter or retail products, either acne or other products other than acne. So basically, new business. And the other aspect was continuing the relationship with Galderma through their potential interest in our Rx program. Galderma is a dermatology company and many of the products - potentially all of the products that we were developing in clinical studies might have been of interest to Galderma for their own prescription drug portfolio. And so, again, it was in one of the emails that was just shown, we were just - we had a meeting shortly thereafter while we were discussing the termination agreement with Galderma on that subject.

305 This is Dr Castella's evidence about the crucial conversation with Mr Wilson, in which, according to Dr Castella, he told Mr Wilson about the proposed termination of the Galderma Agreements. His core evidence of that fact is contained in the passage that is italicised above. That core evidence is somewhat general, but it would be imposing an unrealistically high standard to expect the witness to recollect the conversation in a blow-by-blow manner; if he did that would not be credible.

306 While Dr Castella gave his evidence in chief about the conversation orally, a passage in his first affidavit that had initially been omitted also went into evidence in cross examination. It had been necessary for his evidence in chief about the key conversations to be adduced orally because it was agreed that the relevant passages from Dr Castella's first affidavit would not be read into evidence. But senior counsel for Mr Wilson read two paragraphs of the affidavit in cross examination, and asked Dr Castella to confirm their truth. They were paragraphs 55 and 56, which are as follows:

> Following receipt of Mr McCrea's email [of 1 December 2016] and its attachment, I had a series of telephone conversations with Mr Wilson about the Termination Agreement on 1 and 2 December 2016. During the course of those conversations, Mr Wilson said words to the effect that I should not email him any copies of the Termination Agreement as he did not want drafts being sent back and forth between us. He did not give any other reason explaining why he did not want me to email the agreement to him, and I did not ask him why.
>
> Mr Wilson also indicated during our conversations that he wished to draw out the termination so that he could have an opportunity to potentially generate more OTC product business to replace Galderma. I do not recall the exact words which he used, but he said words to the effect that he was interested in keeping the Galderma Agreements alive and prolonging the onset of the termination. Mr Wilson asked me if Galderma would consider not terminating, and I told him that they would not. He then asked me if Galderma would consider delaying the termination and I again told him that they would not. I explained to him that Galderma no longer wanted to keep making the minimum royalty payments due under the Galderma Agreements.

307 Dr Castella confirmed the correctness of these paragraphs in cross examination so they stand as part of his evidence. However, when asked whether it was the whole of his evidence about the conversations, he said it was not and that Mr Wilson also said that the purpose of the delay he wanted was 'to delay a disclosure requirement' (ts 202). That further point is included in his evidence in chief set out above, but was not in his affidavits.

308 Senior counsel for Mr Wilson challenged him on this in cross examination. Dr Castella had no real explanation for why the point was missing from his affidavit; he only said, 'This was three years ago, so I don't remember exactly what went through my mind three years ago' (ts 202). Although, as senior counsel pointed out, the date of the preparation of his affidavit (2018) was a lot closer to the relevant events than the time at which Dr Castella was giving evidence at trial. He also appeared to allude to his memory returning during the process he undertook with ASIC and its solicitors to prepare for giving evidence. He also said, later, that he did not realise when he gave the evidence to ASIC and its solicitors 'how pedantically parsed all of this sentence would be' (ts 204). He said he did not know how the evidence fitted in to ASIC's case and that he had 'no idea of what it is that they are charging Mr Wilson with' (ts 205).

309 Cross examining counsel then prompted Dr Castella to state, yet again, his best recollection of the substance of the first conversations he had with Mr Wilson after he received Mr McCrea's email of 1 December 2016. His answer was (ts 205-206):

> We covered a number of matters; principally, obviously, the timing. Could they defer it: no, they wouldn't. Why wouldn't they? Because they didn't want to have ongoing obligations with respect to the contract. Were there ways that we could defer it? And in the end, obviously, we came up - well, it came up that the option agreement was a structure that might be acceptable. That option agreement was obviously then written into the agreement. We talked about the buyback. We talked about disclosure. Basically, Frank wanting to manage the process of the announcement of this event and manage that process. So I did as he asked. I didn't email him the document and I guess you would say I was being cautious in linking him into other communications until such things were finalised.

310 In cross examination on the above passages from his affidavit Dr Castella was challenged on the fact that, according to him, Mr Wilson only told him not to email drafts of the Termination Agreement to him, and did not tell him not to send any emails about the subject. But the cross examination on that point was, with respect, not effective. Dr Castella's explanation, namely that he interpreted Mr Wilson's request more broadly, is plausible.

311 Nevertheless, several aspects of Dr Castella's evidence here are less than satisfactory. There is his repeated resort in his examination in chief to the locution of what 'would have' been done,

although allowances need to be made for the natural manner of speech of an inexperienced witness. There is his repeated inability in his evidence in chief to give any recollection of what Mr Wilson said to him about mechanisms to delay the termination coming into final effect, including the option that ultimately found its way into the Termination Agreement.

312 There is also the timing of the alleged conversation, which is what exacerbates the difficulty mentioned above with Dr Castella's account of the sequence of events. I have found that in fact Mr McCrea told Dr Castella that Galderma wanted to terminate the Galderma Agreements, at the latest on Wednesday 23 November 2016, the day before Thanksgiving. Yet according to Dr Castella he did not tell Mr Wilson about this until 1 December 2016. That is a full week after the conversation with Mr McCrea, as I have found it to have occurred, albeit a shorter time on Dr Castella's own account of events. There was no good explanation for this in the evidence. It does not necessarily bespeak concealment or dishonesty. But it is another odd gap in the logic of Dr Castella's evidence.

313 Dr Castella accepted in cross examination that he was dealing with others at Quintis at the time, such as Mr Di Lallo and an in-house lawyer called John Louden. Dr Castella accepted that he did not tell any of these people about the cancellation of the Galderma Agreements, at least not until 'it was done'. In truth there is no evidence to suggest that Dr Castella told those people about it at any time. His reason, given in cross examination, was because 'I told Frank about the termination agreement, and I let him handle it per his request, and to me that meant he handled who needs to know what' (ts 211). Dr Castella gave similar evidence in relation to Mr Gooding, who was a director of Santalis and with whom he was dealing at the time in relation to matters central to the business of Santalis. His response to the proposition that it did not occur to him to share the information with Mr Gooding was 'it occurred to me that Frank would' (ts 212).

314 At this point in his cross examination, Dr Castella made the surprising statement that he could demonstrate with an email that Mr Gooding, Mr Di Lallo and Mr Coetzer knew about the termination of the Galderma Agreements by 18 January 2017 at the latest. However the email, which subsequently went into evidence, does not go that far. It is an email of that date from Jim Traa, Chief Business Officer of Santalis, to Mr Di Lallo about various marketing initiatives and leads, which said among many other things: 'At the end of the day none of these initiatives were in our business plan or budget. They are an "all hand on deck" response to replace the Benzac deal per TFS' request'. It appeared that this email, or at least a subsequent one in the

same chain, was copied to Mr Wilson, Mr Gooding and Mr Coetzer among others. The difficulty with Dr Castella's interpretation of the email, though, is that it does not say whether the 'Benzac deal' had been terminated in the past or was in jeopardy of being terminated in the future and does not descend to any detail as to the termination of the licence and EISO supply components of the Galderma Agreements.

315 The discussion of the email in cross examination was an occasion for Dr Castella to expand on his theory that everyone at Quintis knew about the termination before May 2017 and that the idea that they did not was 'laughable' (ts 216). But the theory was based on a large amount of supposition and conjecture and there would be no point in describing it in detail; I put no weight on it in the face of the unchallenged evidence of numerous officers of Quintis (setting Mr Wilson aside) that they did not know before May 2017 that the Galderma Agreements had been terminated.

Mr Wilson's evidence about the key conversation(s) with Dr Castella

316 In his affidavit tendered after ASIC's case closed, Mr Wilson gave evidence about the key conversation or conversations with Dr Castella. He did not say that there was no conversation with Dr Castella about Benzac soon after Dr Castella received Mr McCrea's email of 1 December 2016. Rather (FW paras 33-34):

> I can recall phone calls with Dr Castella early in the morning at my home on my mobile sometime in December 2016. During one of those conversations he told me Galderma was 'piling on the pressure to discontinue Benzac' and take it off the shelf. I do not recall all of the words used during that conversation but do recall the phrase 'piling on the pressure to discontinue Benzac' being used by Dr Castella.
>
> I said words to the effect 'see if you can get them to agree to kick any decision as to what it was going to do with Benzac and about pulling it off the shelves down the road for 6 months until your Rx trial results are released and then we can have a different negotiating position with Galderma'. I understood at that time that Santalis expected to have results from its Rx trials by mid-2017. Dr Castella said words to the effect that he would go back to Galderma and that he thought he could achieve this.

According to Mr Wilson, this conversation was not confined to Galderma.

317 In cross examination, Mr Wilson confirmed that he did not ask Dr Castella what he meant when he said Galderma were 'piling on the pressure' (ts 676). He said he was 'pretty sure' he understood what that meant, although at the same time he said he did not know how Galderma was piling on the pressure. He was not curious about how Galderma was doing that. He knew that under the Galderma Agreements, the decision as to whether to keep selling Benzac was Galderma's alone. It did not need Santalis's permission to stop selling the product and it had

no obligation to buy any minimum volume of EISO, albeit it was committed to pay a minimum annual royalty. But Mr Wilson's evidence was that at the time he spoke to Dr Castella he was not focussed on the contract, but on 'overseeing our product on shelves and keeping it on shelves as long as we could until the Rx results came in, in which case I thought we would have a very good opportunity to negotiate with Galderma on our terms' (ts 677).

318 Even in the witness box, some 10 years after original iterations of the Galderma Agreements had been negotiated and executed, Mr Wilson had a good understanding of the agreements and the commercial imperatives that drove them. He said (ts 597):

> I thought that the risk of Benzac being discontinued was there and the two year minimum royalties was not an accident. When that contract was negotiated, one of the biggest issues for Santalis was what was called sandbagging, and that is when a pharmaceutical company takes your product and then they don't actually sell it but they just hang on to it and you can't take it to anyone else. So you had to have a penalty built in for that which is where the minimum royalties came in so that if they - if the product wasn't successful and they sandbagged, it would be of some cost to them. So that - that - that provision was not there by accident. It was deliberate.

319 Mr Wilson's evidence was that in the conversations at the beginning of December 2016, however, Dr Castella did not mention a termination agreement or an option clause and those things were not discussed. According to him there was no mention of Galderma's wish to terminate the Galderma Agreements in any conversation that he had with Dr Castella before May 2017. Nor was there any mention of a buyback of EISO.

320 Mr Wilson also denied having any conversation with Dr Castella to the effect that he should not send drafts of any documents or agreements relating to Galderma or Benzac. Nor, according to Mr Wilson, did he tell Dr Castella not to discuss Galderma, or Benzac, or anything to do with the Galderma Agreements, with anyone else at Quintis.

321 According to Mr Wilson, he could not recall a conversation with Dr Castella in December 2016 or at any other time to the effect that he had achieved what Mr Wilson had asked him to do, that is to have Galderma 'kick any decision as to what it was going to do with Benzac … down the road for 6 months' (FW para 63). Mr Wilson's evidence was that he had an understanding that he had achieved that, but he did not recall the basis of the understanding.

322 Dr Castella had no recollection, he said, of having used words about 'piling on the pressure to discontinue Benzac' in this conversation (ts 206). Nor could he recall the use of a phrase about 'kicking' a decision 'down the road', but he did appear to accept that it would be consistent with the tenor of the conversation. He had no specific recollection of Mr Wilson specifying Rx trial

results as the event that would permit announcement of the discontinuance of Benzac (noting that the reference to disclosure came from Dr Castella's evidence, not Mr Wilson's). He also accepted that his going back to Galderma to arrange for them to defer the decision for six months would be consistent with the tenor of the conversation, but he disagreed with the proposition that the above was the whole of the conversation. He did not rule out the idea that he spoke to Mr Wilson on these occasions about additional matters, along with the discussion about Galderma.

The telephone records

323 Another piece of evidence about the key telephone call is comprised of Mr Wilson's mobile telephone records, which ASIC produced. These show that there was a telephone conversation between Mr Wilson's mobile telephone and a number attributed to Dr Castella, at 4.07 pm San Antonio time on Thursday, 1 December 2016, which in Perth was 6.07 am on Friday, 2 December 2016. The call lasted for about 18 minutes. This is capable of being the call described above of 1 December 2016 of which Dr Castella gave evidence (Mr McCrea's email attaching the draft termination agreement was received at 11.16 am, San Antonio time, on the same day). But it is also capable of being one of the calls of which Mr Wilson gave evidence. Dr Castella effectively accepted that he was talking to Mr Wilson about a range of subjects at around this time. So the telephone records provide no real corroboration of the evidence of either witness about the subject and content of the call.

The option clause is added to the draft Termination Agreement

324 In an email sent at 11.45 am (San Antonio time) on Friday, 2 December 2016 Mr Bechstein asked Dr Castella in an email whether he had any update on the draft termination agreement.

325 Dr Castella did not reply right away. It appears that one of the things he was doing on that day, 2 December 2016, was preparing a draft clause embodying the option he says he discussed with Mr Wilson. That is because at 3.21 pm (San Antonio time) that day, Dr Castella sent an email to John Bray, who was an external lawyer for Santalis practising at the firm Elder Bray & Bankler, saying (Exh 545):

> I need to include a mechanism in the Galderma letter that keeps the license potentially alive during the confidentiality period. I have drafted an 'option' that Galderma solely can exercise provide[d] we have not otherwise licensed some or all of the rights to someone else (as we solely determine).
>
> Please could you take a look and rework as needed to make proper legal sense. I don't know if we have to provide any consideration mechanism to make the option more tangible?

Dr Castella's brief reference to 'the Galderma letter' suggests that Mr Bray had already received instructions about the letter. Assuming there was an attachment to the email, it was not in evidence.

326 Shortly after that (at 3.41 pm San Antonio time) Dr Castella replied to Mr Bechstein's request for an update as follows (Exh 546):

> WRT [with regard to] to the letter, TFS are ok with it except for one addition we need to make to basically give you a no-obligation no-risk option during the confidentiality period to renew if you wanted to (to push our disclosure obligation out). I will send you a revision shortly.

327 Both this email and the previous one to Mr Bray are consistent with Dr Castella's account of the conversation with Mr Wilson on 1 December 2016. In cross examination Dr Castella relied on it as corroborating his evidence (not given in his affidavit) that Mr Wilson said that the purpose of the option was to delay a disclosure requirement. He said that by 'our' disclosure obligation he was referring to Quintis rather than Santalis. When he was questioned in cross examination as to whether Mr Wilson said words to the effect that pushing the disclosure obligation out was the reason why there was to be an 'extension' to the Galderma Agreements to 1 July 2017, Dr Castella's evidence became firm: 'Yes, why on Earth would I want a six-month extension on a document? It had no bearing to me. This was purely inserted at Frank's request for his/Quintis' needs' (ts 226). Dr Castella described as 'laughable' the suggestion that he had made it up for the purposes of his evidence.

328 According to Dr Castella, it was on or about 5 December that he revised the draft Termination Agreement by inserting the option clause. That is inconsistent with the emails of 2 December 2016. I prefer the inference that arises from the emails - that Dr Castella first drafted the option clause on 2 December before sending it to Mr Bray - but nothing turns on that, other than that it provides another reason to be cautious about the reliability of Dr Castella's evidence.

329 The next communication in evidence followed the weekend. On Monday, 5 December 2016 at 11.08 am (San Antonio time), Dr Castella emailed a 'revised version of the letter' to Mr McCrea. The email relevantly said (Exh 559):

> we only made one change of note, which was to grant Galderma an option to renew, solely at your discretion, through the confidentiality period. This was necessary to avoid triggering an immediate disclosure by TFS. Although this section is a bit wordy, [it] is not intended to put any additional obligation on Galderma whatsoever - please feel free to call me [to] discuss if necessary.

330 Once again, there is a reference to disclosure which is consistent with Dr Castella's account of the key conversation with Mr Wilson. The option clause in the draft attached to Dr Castella's email gave Galderma the option until 1 July 2017 to 'reinstate' the Galderma Agreements provided that at that time neither Santalis nor ViroXis had entered into agreements that would conflict with the rights of Galderma or the obligations of Santalis or ViroXis under the Galderma Agreements.

331 Mr McCrea responded within the hour, thanking Dr Castella for the 'quick turnaround' and saying that he would review it and get back to him quickly. And Galderma did indeed get back to Dr Castella quickly, with Mr Bechstein emailing him at 2.15 pm (San Antonio time) with some 'minor adjustments' and asking him 'to review and if aligned we will create a clean version for signatures' (Exh 548). The changes Galderma made to the option clause are not material for present purposes.

Dr Castella emails Mr Wilson on 5 December 2016

332 Just over an hour after receiving the amended draft back from Mr Bechstein, at 3.25 pm on 5 December 2016 (San Antonio time), Dr Castella emailed Mr Wilson with the subject line 'call me when convenient to discuss Galderma'. The text of the email said 'I got the language approved and wanted to run it by you first' (Exh 550). Dr Castella's explanation of the email in examination in chief was (ts 83):

> we had requested changes to the termination agreement to include the option clause. Galderma had approved the language - or we got the final language approved. And I was emailing Frank to call me or me to call him but to talk to Frank so that he could be updated on the document before it proceeded any further.

333 Mr Wilson's mobile telephone records indicate that in the late afternoon on 6 December 2016 (San Antonio time) (so early morning on 7 December 2016, Perth time) he had at least two telephone conversations with Dr Castella which lasted for six minutes and 13 minutes respectively.

334 Dr Castella's evidence was that he recalled that he had a conversation with Mr Wilson at about this time. His recollection was (ts 83):

> … I wanted to make sure that Frank was fully apprised of the option agreement language. It was put in there at his behest, so I wanted to make sure it served his purpose. So I would have - well, I did read him the document or the option agreement section of the document before I would have then gone and signed the agreement with Galderma. But I needed his approval, essentially

> Well, what do you recall Mr Wilson saying to you in that telephone conversation?---
> That it was acceptable. I don't remember the specific words that were spoken.

335 Dr Castella's evidence was that he did not at this time give Mr Wilson a copy of the Termination Agreement, whether in draft or in its final version.

336 Further (previously excluded) evidence from Dr Castella's first affidavit was also introduced in cross examination, as follows (para 69) (ts 227):

> After I sent this email, I do not recall whether Mr Wilson called me, or I called him, but I recall that we spoke by phone several times on 6 December and 7 December 2016. I told Mr Wilson that Galderma had agreed to the inclusion of the option clause in the Termination Agreement. I do not remember if I read the option clause to Mr Wilson, but I remember we discussed the Termination Agreement and the option clause …

It was, effectively, put to Dr Castella in cross examination that this evidence was false, which he denied.

337 In his cross examination, Mr Wilson rejected the proposition that he had a conversation with Dr Castella about the language of the option clause and said that Dr Castella did not read the option clause to him. Mr Wilson also rejected the proposition that he said to Dr Castella that the proposed wording was suitable, satisfactory or acceptable. It was put to Mr Wilson that the reason Dr Castella wanted to insert the option clause into the Termination Agreement was so that Mr Wilson could justify not making disclosure at that point, which he firmly rejected. Mr Wilson agreed that he had a conversation with Dr Castella after receiving the email dated 5 December 2016, although said that he had received 'three or four emails from him' such that the conversation related to other matters, namely a contract with Costco (ts 689). Dr Castella accepted in cross examination that there were indeed 'further discussions and numerous emails … that involved you, Mr Wilson, Mr Gooding, Mr Di Lallo and others up to and including 16 December dealing with matters such as the Costco agreement' (ts 226).

The Termination Agreement is finalised and executed

338 On Wednesday, 7 December 2016 Mr Bechstein followed up Dr Castella about the termination letter, asking when 'your internal review will be complete?'. Dr Castella replied later in the evening of that day saying 'I think we are good to go with the last version you supplied, with just one request: please can we date it the 16th, even if we take care of it earlier?'.

339 According to Dr Castella's evidence in chief, 'Frank had asked if we could make the date the 16th' (ts 83). Dr Castella gave no explanation at that point of his evidence as to why Mr Wilson

had asked for that. But when it was put to him in cross examination that Mr Wilson had not requested there be a delay in the effect of the termination agreement because of disclosure obligations, Dr Castella said that was not true. He recalled that the reason for requesting the change of the date of termination was because Mr Wilson wanted to defer the date of disclosure. This evidence did not appear in either of his two affidavits, instead, he only seemed to remember the reason for requesting the delay at trial. It is relevant to note, however, that it appears from the board pack for Quintis's Board meeting on 25 November 2016 that the next scheduled meeting was to occur on 15 December 2016.

340 Dr Castella and Mr Bechstein exchanged further emails on 7, 8 and 9 December 2016 concerning further changes to the draft Termination Agreement. One of those was that Galderma accommodated Dr Castella's request for the letter to be dated 16 December 2016. The others mainly concerned details about the terms of repurchase of Galderma's stocks of EISO, which are not presently material.

341 On 14 December 2016 (San Antonio time) Mr Bechstein sent Dr Castella a final version of the Termination Agreement which had been signed on Galderma's behalf. Dr Castella returned it, signed by himself on behalf of Santalis and by Mr Clements on behalf of ViroXis, on the same or the following day (it is not clear from the email timestamps which, but nothing turns on it). Subject to the introduction of the option, the relevant effect of the Termination Agreement had not changed since the draft of 1 December 2016, so each of the Galderma Agreements was terminated effective as of 1 January 2017. Galderma thus had no obligation to pay any minimum royalties for any year after calendar year 2016. As indicated above, however, until 1 July 2017 Galderma had the option at its sole and absolute discretion to reinstate the Galderma Agreements.

342 Dr Castella's evidence was that there were two signed originals of the Termination Agreement, one held by Galderma and the other somewhere in Santalis's records. Once again, in cross examination a previously excluded passage from Dr Castella's first affidavit was introduced into evidence, to the effect that Dr Castella did not email a copy of the executed Termination Agreement to Mr Wilson because he had previously instructed Dr Castella not to send him copies by email.

343 On 14 December 2016 (Perth time), Board reports were circulated to Quintis's Board in lieu of any meeting that month. Why the Board meeting scheduled for 15 December did not take place does not appear from the evidence. The next meeting was scheduled to be in February 2017.

344 Mr Wilson's Managing Directors' report of December 2016 did not mention the termination of the Galderma Agreements, nor did any of the other Board reports. It is common ground that at no time between 1 December 2016 and May 2017 did Mr Wilson tell the Board of Quintis that the Galderma Agreements had been terminated. His case, of course, is that he did not tell the Board because he did not know.

345 On 15 December 2016, Dr Castella sent Mr Bechstein a purchase order for the EISO to be repurchased. Although he said in cross examination that purchase orders 'all went through Quintis' (ts 185), there is no evidence in the documents that the purchase order was seen by anyone other than Dr Castella, Mr Clements, Mr Bechstein and Mr McCrea.

January 2017

346 In January 2017 Dr Castella travelled to London for meetings with investment banks about a potential IPO of Santalis. He spent about a week there and attended the meetings along with Mr Stevens.

347 Mr Stevens' unchallenged evidence is that he did not know about the termination of the Galderma Agreements at this time. When it was put to Dr Castella in cross examination that he did not tell Mr Stevens about the Termination Agreement during their time together in London, his evidence was (eventually) 'No, I - I thought he knew, but I don't recall a specific conversation to that point' (ts 231). In the questioning that followed, Dr Castella accepted that he had not said anything about the Termination Agreement to Mr Stevens. Dr Castella's evidence was essentially that it did not come up, and he assumed that Mr Stevens knew, because he assumed that Mr Wilson had told him.

348 Dr Castella denied that the subject of Galderma came up in the presentations he was making to institutions during this roadshow because the presentations were premised on Rx drug development. He also said that if there had been no public disclosure at that time, he would not have taken it on himself to disclose it. He denied that he was asked any direct question about it. He denied deliberately concealing it from Mr Stevens or the investment banks.

349 In late January 2017 Mr Coetzer went to San Antonio for a week. Dr Castella spent time with him then. Mr Coetzer's evidence was that there was no discussion during the visit to the effect that Galderma was proposing to terminate or had terminated the Galderma Agreements. According to Mr Coetzer 'the concept of oil coming back had been discussed' (ts 351), by which he appeared to be referring to EISO that had been supplied to Galderma. Mr Coetzer

had no recollection of specifics, however, for example whether the EISO was to be repurchased or simply returned.

350 Dr Castella did not categorically accept that Mr Coetzer was not told about the Termination Agreement during the visit, but he emphasised his view that the email of 18 January 2017 (see [314] above) informed Mr Coetzer 'that the deal was dead' and Dr Castella asked rhetorically why Mr Coetzer did not ask 'what the hell is going on here?' (ts 233). Dr Castella's speculative answer to that rhetorical question was that Mr Wilson knew and Mr Wilson must have told Mr Coetzer (and others). A little later, Dr Castella described his reliance on the email of 18 January this way (ts 235):

> … the entire body of our interactions with them are consistent with them knowing. And this is a piece of written evidence that I am able to produce to substantiate that statement … But I'm not saying that because necessarily directly because of this, this is the only way Phil or anyone else knew. I'm saying this is - they certainly should have known from this, but I - I would hope there's other emails to this effect.

351 When it was put to Dr Castella that Mr Coetzer said that in the week that he spent in San Antonio nobody told him about the termination of the Galderma Agreements, Dr Castella introduced more new evidence. He said (ts 235-236):

> … I find that very difficult to accept. I remember there was a lunch at Red Robin where … [Dr Corey] Levenson [Santalis Chief Scientific Officer] said to the effect, 'It's a shame we're going' - - -
>
> Sorry, were you present?---Yes, yes. Yes, the whole team. Yes. Mr Levenson said to the effect that, 'It was a shame about the Galderma deal being cancelled and now we have to end the' - I think it was a HPV study that he was conducting. And Mr Coetzer said to the effect, 'Yes, is a shame. We will definitely have to replace that.'

Dr Castella denied that this was, in the words of senior counsel for Mr Wilson, 'a blatant lie'. Mr Coetzer was not asked about this alleged conversation when he gave evidence.

The Board meetings of February 2017

352 Meetings of the board of directors of each of Santalis and Quintis took place in Perth on 22 February 2017 and 24 February 2017 respectively. Dr Castella travelled to Perth for the meetings. They took place at Quintis's offices on Broadway in Nedlands.

353 Dr Castella had (with others) prepared a report on behalf of Santalis to Quintis's Board, dated 15 February 2017. It referred to Galderma's interest in Santalis's Rx products but made no mention of Benzac, the Galderma Agreements or the Termination Agreement, save for brief

references in a list of historical KPIs (see [268] above). In cross examination Dr Castella explained this as being the result of (ts 239):

> [a] combination of factors. At this point, it's quite after the fact - my, again, working assumption and all the evidence to this is that everyone is aware of the situation. And, again, Frank didn't ask me to use this opportunity to update the board on the Galderma situation any further.

354 Dr Castella's oral evidence was that he handed Mr Wilson a copy of the Termination Agreement as they were going in to the Santalis board meeting. In cross examination he called it 'the relevant part of the pre-meeting' (ts 241). When challenged on that, Dr Castella was firm, saying, 'I guarantee I handed Mr Wilson the copy of the contract' (ts 241). For the first time, he added the detail that it was in a stack of papers which he gave to Mr Wilson, seemingly Santalis board papers. According to Dr Castella he told Mr Wilson that the Termination Agreement was in the stack or, as he then put it 'a stack or a bundle or whatever you want to call more than one document' (ts 242).

355 He had not given Mr Wilson a copy before that because, he said, Mr Wilson had told him not to 'email him any of this correspondence' because '[h]e expressed concern that the matter would, I guess, leak out before it had been properly concluded and he had appropriately managed it' (ts 84).

356 However, the evidence that he gave the Termination Agreement to Mr Wilson before the Santalis board meeting was inconsistent with the evidence in his affidavit which, while it was not read into evidence, was introduced in cross examination. There, Dr Castella said he gave the Termination Agreement to Mr Wilson before the Quintis Board meeting, not the Santalis one.

357 Mr Wilson's evidence was that he had no recollection of being given any papers by Dr Castella before either the Santalis board meeting or the Quintis Board meeting, and that he did not have any conversation in which Dr Castella told him that he was giving him a copy of the Termination Agreement. In cross examination he rejected the proposition that Dr Castella gave him a hard copy of that agreement before either the Santalis board meeting or the Quintis Board meeting.

358 Dr Castella attended the Quintis Board meeting on 24 February 2017. Ms Franklin was there too. According to her affidavit affirmed on 20 March 2019 (**GF** paras 42-43), Ms Franklin asked Dr Castella:

> about the status of the Galderma Agreements given the lack of purchases by Galderma and Galderma's concern regarding the cost of EISO.
>
> In response to my question, Mr Castella said to the Quintis Board words to the effect that 'Galderma will not be purchasing any more oil'.

In cross examination Ms Franklin said she remembered it very clearly: 'I asked him specifically, "Are they buying any more oil?", and he said, "No"' (ts 380). As I have said, I accept Ms Franklin as a reliable witness and I accept the evidence she gave convincingly in cross examination as her best evidence of the exchange with Dr Castella. No other witness specifically recalled it, including Dr Castella and Mr Wilson. Mr Kay did, however, say in cross examination that asking such questions 'was a bit of a theme of Gillian's … with her expertise in that space, and her understanding of pricing and consumer acceptance, more than once she would have asked questions of that nature' (ts 395).

359 Dr Castella did not give a copy of the Termination Agreement to anyone else, nor on his evidence did he tell anyone on the Quintis Board about it other than Mr Wilson (before 9 May 2017). That was because, according to him (ts 84):

> Frank wanted to - was very clear that he wanted to manage the process by which this was disseminated and so I - I left it to him to manage it. And then, essentially, it didn't come up again, so there was no real venue for me to say this.

360 In cross examination Dr Castella seemed to accept the fact that the termination of the Galderma Agreements did not come up at the board meetings on the basis that there were 'many, many topics to discuss' and it was a done deal and was not on the agenda for the meeting.

The ASX queries and Quintis's responses

The Glaucus Report

361 On 22 March 2017, TFS formally changed its name to Quintis. On the same day, Glaucus released the Glaucus Report which, as has been said, was highly critical of Quintis's business model and which valued its shares at nil. Quintis's shares dropped in price from $1.415 per share to $1.31 by the end of that day.

The ASX queries

362 Also on 22 March 2017, the ASX wrote to Quintis noting the drop in price and a significant increase in the volume of shares traded, and asking a number of questions including whether Quintis was aware of any information concerning it that had not been announced to the market that could explain the recent trading in its shares. Quintis's response released the next day

referred to and criticised the Glaucus Report and reaffirmed its recent market guidance that its cash earnings for FYE 2017 (before income tax, depreciation and amortisation) would increase by at least 25% on the previous year. The response said that the company was in compliance with its continuous disclosure obligations under the ASX Listing Rules.

363 On 24 March 2017, the ASX wrote to Quintis again. The letter referred to a number of announcements Quintis had made to the market between February 2016 and February 2017, many of which referred to customers in China, India, the Middle East and the US. The letter asked the following question (among others): 'Please provide the names and any material information in relation to each of the buyers in China, India, the Middle East and the US referred to in the announcements above' (Exh 652). It also asked for confirmation that the company was in compliance with the ASX Listing Rules, in particular Listing Rule 3.1 (continuous disclosure).

The 27 March Response

364 Quintis released its response to the query on 27 March 2017, that is, the 27 March Response. There is a Board minute from that day confirming that the Board, including Mr Wilson as Managing Director, authorised the release of the response to the market. At Quintis's request, the ASX placed Quintis's shares in a trading halt before the announcement pending its release.

365 There was a great deal of evidence led about the process internal to Quintis that resulted in the 27 March Response. But I do not consider that the process is relevant, save in one respect. Save in that one respect, the evidence sheds no light on the state of Mr Wilson's knowledge at the time, and the test as to whether the 27 March Response is potentially misleading is an objective one.

366 The one respect in which the evidence about the process that led to the 27 March Response is arguably relevant is that Mr Matthys's unchallenged evidence was that at some point during the period 24 to 27 March 2017, a table had been prepared identifying Quintis's customers and the basic terms of the supply agreements. It was originally preceded with a statement to the effect that 'Quintis is supplying the following customers'. According to Mr Matthys, he and others on the Board believed that the Galderma Agreements were still on foot and that Benzac was still on the market. But they expressed concern that a representation that Quintis 'is' supplying EISO to Galderma could be misleading because none had in fact been supplied since 2015. According to Mr Matthys, it was Mr Wilson who first raised this issue in an email to the other directors and external advisors saying (Exh 679):

We definitely need to qualify Galderma under the context of a client we have supplied to, rather than a client we continue to supply. Rather than single out Galderma may be better to amend the heading so that it reflects material contracts under which TFS has supplied wood or oil?

367 The Board decided to deal with the concern essentially as Mr Wilson suggested. The 27 March Response relevantly said:

In response to your query, Quintis Ltd (ASX:QIN, 'Quintis' or the Company) provides the following information:

1. Names of customers

Quintis sells sandalwood to a variety of buyers across a range of both markets and countries. This diversification of products and markets has been a key part of Quintis's business strategy (refer: 2015 AGM presentation Slides 8 and 18, 13 November 2015).

a) High value Indian Sandalwood (Album)

Quintis owns and manages over 12,000 hectares of Indian Sandalwood (Album) plantations across northern Australia. Quintis commenced annual commercial harvests from these plantations in 2014. The 2016 harvest produced 310 tonnes of heartwood and in 2017 the Company expects a yield of approximately 240 tonnes of heartwood. The majority of both these harvests were pre-sold.

The following table lists customers Quintis has supplied wood or oil to under multi-year contracts:

Name	Jurisdiction	Product	Annual Volume	Price	Date Signed	Term
Galderma	USA	Oil	No fixed volume	US$4,500 per kg plus annual CPI (capped at 3%)	2014	20 years
Lush Cosmetics	UK	Oil	Minimum of 1,000 kg	US$2,000 per kg plus annual CPI (capped at 3%)	2008, effective from 2015	5 years
Medinext General Trading (1)	India, North Africa and Middle East	Wood	30t	US$155,000 per tonne plus 3% annual increase	2016	2 years + option to extend by 3 years
Shanghai Richer Link	China	Wood	150t	Pricing dependent on grade of wood; average of US$150,000 per tonne plus 3% annual increase	2016	5 years
Young Living	US	Oil	1,200kg	US$4,500 per kg plus 2.5% annual increase	2016	5 years

Note 1: Medinext General Trading is an associate of a customer who has been supplied and paid for AU$27.5m of spicatum oil since 2010

In addition, Quintis has a number of customers who acquire its Indian Sandalwood (*Album*) products but have not entered into long-term contracts. These customers include IFF in Europe and Paspaley in Australia; all these supplies have been priced at US$4,500 per kg of oil or above (or equivalent wood pricing).

…

368 Much of the rest of the report gave details of what, according to Quintis, were the 'substantial and egregious inaccuracies' in the Glaucus Report. Only the table reproduced above mentions Galderma.

Mr Wilson resigns

369 Also on 27 March 2017, Mr Wilson resigned as Managing Director and from the Board of Quintis. Quintis announced the resignation to the market the next day. By way of explanation, the announcement stated that Mr Wilson had 'received an offer to potentially partner with an unnamed international corporation to present a proposed change of control transaction to the Company board' (Exh 756). On 30 March 2017 Quintis announced that Mr Wilson had been replaced by the appointment of Mr Matthys as Interim CEO, and Mr Matthys was appointed CEO on 3 April 2017.

370 About a week after Mr Wilson's resignation, on 5 April 2017, he sent a text message to Dr Castella which said 'This is my new private number cheers frank please text me your email so I can resume email contact' (Exh 770). A string of friendly text messages between Dr Castella and Mr Wilson spanning April to June 2017 was in evidence. They were mostly about Santalis's business, such as clinical trials and IPO prospects.

371 For example, on 24 April 2017, Dr Castella said in a text message to Mr Wilson about IPO plans, 'bTW, we were told not to talk to you so you didn't hear anything from me!'. Mr Wilson replied 'Of course'. Dr Castella replied approximately two days later, 'We are under instructions to not communicate with you without Julius's permission and also [under] an ASIC order to produce any documents related to your resignation or any deal'. One of the things Mr Wilson said in reply was 'Btw you can ignore Asic issue unless unbeknown to me you were behind the approach made to me'. Dr Castella replied 'Yes, all part of my cunning plan :-) You have to realize I am totally in the dark with Quintis and all we get are ominous memos. I want the IPO to happen more than anyone, just trying not to get fired before that happens! …'. Mr Wilson replied, 'The risk of you getting fired is 1%, the risk of these incompetents missing an IPO is 100% unless we run our own race'.

372 Mr Wilson and Dr Castella appeared to be sharing information about Dr Castella's presentations about Santalis to institutions. The tenor of some of Mr Wilson's text messages to Dr Castella in this period was highly critical of Quintis's then management. For example, he referred to them as 'incompetents' twice, and once as 'paralysed'. Within two months of these exchanges, Mr Wilson said in a text message that he would be attending Dr Castella's

wedding, to which Dr Castella replied, 'OK, great to hear, see you in a few weeks'. Even after the events of the preceding months, Mr Wilson and Dr Castella appeared to be on good terms.

The Board finds out about the Termination Agreement

373 Every member of the Board of Quintis as at the beginning of May 2017, as well as Mr Stevens, gave evidence that at that time, they did not know about the termination of the Galderma Agreements. This evidence was unchallenged and I accept it.

Contact from the Australian Financial Review

374 On 9 May 2017, FTI Consulting, the communications consultancy firm retained by Quintis, emailed Mr Gooding telling him that they had received a call from a journalist at the Australian Financial Review saying that Nestlé had given her a quote saying that they had 'cancelled the Quintis contract, which is contrary to what we put in our Glaucus response to the ASX'. FTI Consulting said that they were trying to get to the bottom of it and would keep Mr Gooding informed.

375 Also on 9 May 2017, FTI Consulting emailed Mr Matthys and Mr Stevens saying they had received a call from the same journalist (Exh 806):

> re Benzac and continued use of Sandalwood oil. Apparently she has been in touch with Nestle Skin care who have told her via a spokesperson:
>
> 'we confirm that the specific formulation for Benzac with sandalwood oil is discontinued, and the licence of the Australian supplier (of sandalwood oil) was terminated'
>
> (transcribed say [so?] may not be word for word correct)

Dr Castella sends the Termination Agreement to Mr Stevens and Mr Matthys

376 Mr Stevens forwarded that email; it is not entirely clear to whom but it can inferred to Santalis, asking 'someone' to call him urgently about it.

377 Mr Matthys then telephoned Dr Castella. He said that he had been informed by FTI Consulting that the Galderma Agreements had been terminated, and asked whether Dr Castella could shed any light on this claim given that the Quintis Board and Quintis management had no knowledge of it. Dr Castella confirmed that an agreement had been reached with Galderma and that he would send them a copy, which would explain the situation.

378 Dr Castella then sent an email replying to Mr Stevens' email, to which Dr Castella attached the Termination Agreement, saying 'See attached - they have the option to reinstate up to July 1,

2017 per section 5. You will also note that they are presumably in breach of confidentiality in section 6' (Exh 806). Mr Clements and Mr Matthys were copied in. There was a subsequent email exchange in which Mr Stevens sought and Dr Castella gave confirmation that 'this' applied to the oil supply agreement between Santalis and Galderma. It is not clear what 'this' was referring to - it may have been the option or the entire Termination Agreement.

Further communications between Mr Matthys and Dr Castella

379 Mr Matthys spoke to Dr Castella several more times on 9 May 2017 (Perth time). His unchallenged affidavit evidence about those conversations was as follows (JM1 paras 58-61):

> 58. … I had several further telephone conversations with Mr Castella on 9 May 2017 regarding the Termination Agreement and Mr Castella's explanation as to why the Quintis Board was unaware of it. I do not remember precisely how many conversations we had, but it may have been up to five or six over the course of that day.
>
> 59. Initially, Mr Castella suggested the Galderma Agreements had not been terminated, but rather that Galderma had until the end of June 2017 to decide whether to terminate. I did not accept that explanation as it was clear to me from the face of the document that the Galderma Agreements had in fact been terminated. I stated to him words to the effect that 'How can you say that? Look at the heading, it is pretty clear that the agreements with Galderma have been terminated'. Mr Castella explained that he believed the 'Option' contained at paragraph 5 of the Termination Agreement meant that the Galderma Agreements were still on foot, and he had worked with Mr Wilson to have the Option included. I stated to him that I considered that the option he was referring to was an option to reinstate, not an option to terminate, and the effective termination date was 1 January 2017. Mr Castella maintained that the inclusion of the option was done in accordance with Mr Wilson's instructions.
>
> 60. When I asked him why no one on the Quintis Board had been informed about the Termination Agreement, Mr Castella stated words to the effect that:
>
> 60.1. he did not know why the Quintis Board had not been informed;
>
> 60.2. as the CEO his primary duty was owed to the Santalis Board, of which Mr Wilson was a member;
>
> 60.3. Mr Wilson was aware of the Termination Agreement;
>
> 60.4. he had hand delivered a copy of the Termination Agreement to Mr Wilson when he was present in Perth for the Quintis Board meeting on 24 February 2017; and
>
> 60.5. it was Mr Wilson's responsibility to convey this information to the Quintis Board, and accordingly he had assumed Mr Wilson had done so.
>
> 61. I asked Mr Castella whether he had also informed Mr Gooding about the Termination Agreement given he was also a director of Santalis. Mr Castella said he could not remember whether he had done so, but said that he had

> sufficiently discharged his duty by advising Mr Wilson. I asked him why he had hand delivered a copy of the document to Mr Wilson by personally transporting it from [San Antonio] to Perth rather than circulating it to everyone by email. Mr Castella said in response that he avoided using email to circulate the Termination Agreement because he was concerned about maintaining its confidentiality.

380 The same day, at Mr Matthys's request, Dr Castella sent him an email which said (Exh 825):

> With respect to the Galderma letter I would like to point out the following:
>
> 1. The letter was originated by Galderma to avoid the minimum payment due each year, whether they ordered oil and sold product, or not (there is no oil minimum).
>
> 2. We were advised by Frank that it would be very helpful to delay the decision, if possible, in order for Quintis to 'replace' Galderma as a customer, even though I don't think they ordered any oil in 2016. There was an intense effort, known to Quintis through our weekly calls and board documents, to find new customers for the oil that would have been otherwise allocated to Galderma. This included [Young Living] and a lot of Indian prospects driven from the Quintis side, as well as our own efforts.
>
> 3. We were under the belief through discussion with Frank that the option to renew and the confidentiality clause were appropriate for the purpose of pushing the decision out until July, and therefore a requirement for Quintis to announce this event. We ran the letter by our counsel.
>
> 4. We made the status of the contract known to our board and believe we delivered a copy of the letter to Frank in person.
>
> 5. We did not know that the Quintis board were unaware of the document.
>
> 6. We thought the royalty payment status and repurchase of oil were known to Quintis through our financial records.
>
> 7. We continue to communicate with Galderma regarding our Rx program, in which we believe they have a genuine interest - we met with them at JPM on this point.
>
> 8. Our communications on roadshows since this event have focused entirely on the Rx program, deemphasized the importance of the OTC lines to Santalis, and we have made it clear that we did not see any future for the OTC Benzac product (they bought Proactive).
>
> I will look for any additional documentation in the morning, and since it is late, I may not have covered all the points, but would be happy to discuss further tomorrow.

381 According to Mr Matthys's evidence he spoke to Dr Castella after receiving this and challenged him on the statement that any intense effort to find new customers for oil that had otherwise been allocated to Galderma was known to Quintis. Mr Matthys's evidence was that he was not aware of any specific efforts to replace Galderma as a customer. Dr Castella's response was to the effect that he would have thought that Mr Wilson briefed him on that.

382 Mr Matthys also received an email from Mr Coetzer on 9 May 2017 in which Mr Coetzer disavowed any prior knowledge of the Termination Agreement, saying that it had not:

> come up in any of the discussions I've had to date with anyone. I was however made aware of the repurchase of the EISO (c.100kg) from Galderma during my 5 days in San Antonio back in January (23 Jan 17 to 27 Jan 17). When I asked about the reason for the repurchase I was told by Paul Castella that it was excess to Galderma's requirements. He then commented on the poor performance of the Benzac product and made me aware of Galderma's acquisition of Proactive. He said we are still waiting on Galderma to confirm their intentions going forward.

383 However Mr Coetzer's oral evidence about the visit, given in the cross examination conducted on behalf of Mr Wilson, did not come up to that level (see [349] above) and he was not asked about the specific content of this email.

Mr Matthys speaks to Mr Wilson

384 After his initial conversations with Dr Castella and after receiving a copy of the Termination Agreement from him, Mr Matthys telephoned Mr Wilson. He could not recall whether he had one or two conversations with Mr Wilson on that day. His evidence was that Mr Wilson denied knowing about the Termination Agreement or having seen it, and said that his understanding was that Galderma was in the process of deciding how to proceed with its relationship with Santalis in view of the acquisition of Proactiv, and intended to make a decision by 1 July 2017. According to Mr Matthys, Mr Wilson also said things to the effect that it was unlikely that Santalis would have supplied any more EISO to Galderma because of Nestlé's acquisition of Proactiv, that Quintis had not made any announcements in the preceding 12 months that foreshadowed an intent by Galderma to order any more EISO, and that it was unlikely that Dr Castella had placed emphasis on the Galderma Agreements during the roadshows he had attended.

385 Mr Matthys asked Mr Wilson why he had not informed the Quintis Board about Galderma's plan to make a decision by 1 July 2017. He said that he did not do so because he believed everyone on the Board was already aware that Galderma was unlikely to order any more EISO, and therefore whether or not the Galderma Agreements continued was irrelevant to Quintis's earnings and outlook.

386 After that conversation, Mr Wilson sent Mr Matthys the following email (Exh 812, subject line 'galderma'):

Julius re our conversation.

1. To my knowledge I have never seen the document you are referring [to].

2. I was aware (because Paul advised me) that galderma had entered into an agreement with santalis that had the [effect] that Galderma would make a decision in July regarding the termination of the contract, or proceeding with it.

3. I was aware that because galderma had purchased proactive it was unlikely we would be supplying them anymore oil regardless of whether we had a contract on foot, or not. Our contract wholly depended on them on selling Benzac so whether the contract was on foot or not it had no bearing on the likelihood of us supplying them. The contract did not require them to buy any minimum quantity of oil , It was not a take or pay contract.

4. I am not aware of the company suggesting in any releases in the past 12 months that Galderma was likely to order any more material quantities of oil, indeed we have been most careful to avoid this.

5. I did not advise the board as I thought July was the time a decision would be made, and as Galderma had not been ordering any oil from us for at least 12 months and the entire board [knew] that, whether we had a contract on foot or not was not material to our earnings, or our outlook. I think everyone on the board recognized Galderma was not going to be ordering any more oil.

6. I am not aware of what paul has been saying on his roadshows but I very much doubt he would have been putting any emphasis on galderma.

I hope this helps.

387 The document Mr Wilson was referring to was the Termination Agreement. According to Mr Matthys, this email accurately reflects what Mr Wilson told him in the telephone conversation, save that in relation to item 2, he understood from Mr Wilson only that he was aware that Galderma was going to make a decision by 1 July 2017. It follows that Mr Matthys's evidence is that Mr Wilson did not tell him in the telephone conversation that Galderma had entered into an agreement with Santalis that had the effect that Galderma would make a decision in July regarding the termination of the Galderma Agreements or proceeding with it.

388 In cross examination Mr Wilson gave evidence that he became aware of the position stated in the second point of the email set out above from a conversation with Dr Castella which, after working through the materials for the purposes of this proceeding, he now believed was in early December 2016, namely the call in which (on his version of it) he discussed with Dr Castella Benzac being discontinued. However he sought to walk back from the natural meaning of the statement that Galderma 'had entered into an agreement' with Santalis. In cross examination Mr Wilson said (ts 662):

> I'm - I'm trying to convey to Julius and I didn't articulate it as well as I should have, but I was trying to convey to him that I was aware that at this point in time, that Paul and Galderma had come to some form of understanding or accommodation that the whole decision with respect to taking Benzac off the shelves, the whole Benzac issue, would be kicked down the road for six months which was June/July.
>
> …
>
> … I was intending to convey that Paul and Galderma had reached some form of understanding or consensus that the whole Benzac matter and taking things off the shelves will be kicked down the road until the middle of 2017.

389 When it was put to him that he had chosen the words 'had entered into an agreement' as a commercial lawyer of 15 years standing, Mr Wilson said that his head was spinning at that time (that is, after he received the call from Mr Matthys in May 2017 which is described further below) and that he regretted that he did not spend 'a bit more time thinking about it' (ts 662).

390 This evidence of Mr Wilson's was unconvincing. Whether his head was spinning at the time he wrote the email or not, the wording in item 2 of the email is quite specific. It speaks of an agreement and of its effect. The effect concerns the 'termination of the contract', obviously a reference to the Galderma Agreements. All this conveys that two companies had entered into an agreement with legal effect. It does not convey that they had merely 'reached some form of understanding or consensus'.

391 Mr Wilson appeared to be improvising in the witness box at this point when he said that Mr Matthys had been talking to him about termination. But as the cross examiner pointed out, the purpose of the email was not to tell Mr Matthys what Mr Matthys already knew; its purpose was to tell him what Mr Wilson knew. I also accept the implication in the questions asked of Mr Wilson that it was unlikely that an experienced lawyer would have failed to appreciate what the words he used here meant, even if his head 'was spinning'. And there is in any event a tension between that idea and the basis of Mr Wilson's entire case, that by May 2017 the termination of the Galderma Agreements was not material.

392 Mr Wilson sent Mr Matthys another email on the same day (Exh 832, subject matter 'galderma') which said:

> Julius further to my previous email how can it be a material non disclosure if a customer who has no contractual obligation to order, is showing no immediate intention to order, and where none of the company management forecasts for oil supply include orders from this customer, terminates a contract (with an option to reinstate exercisable by July) ? I am sure you will work this into your ASX release. A non ordering customer cancelling a no obligation to order contract ? be very different if it was a take or pay contract and you had nobody to fill the gap. Btw is there any confidentiality clause in this agreement Paul and Ian have signed ? Cant believe Galderma have spoken to press before speaking to you.

393 Mr Matthys thought he may have had a discussion with Mr Wilson before this about the Quintis Board's deliberations about whether to issue an announcement to the ASX regarding the Termination Agreement, but he was not completely sure that he did.

394 Also on 9 May 2017, Mr Wilson sent a text message to Dr Castella (Exh 770):

> Please call me asap, this Galderma thing is a beat up, how can it be material if a long non ordering customer terminates a non obligation contract? I thought the drop dead date on contract was July but regardless it has no material bearing on earnings or [future] prospects for Santalis.

395 There was no protestation in that text message that Mr Wilson had not been told about the termination of any agreement. When cross examined on the fact that he referred to the 'drop dead date *on contract*' (emphasis added), not a drop dead date on making a decision on Benzac, Mr Wilson's evidence was again unconvincing (ts 734-735):

> And so this is an email that you - text message rather, that you send to him on 9 May?---Yes.
>
> After you have spoken to Mr Matthys, I take it?---Yes, and I think it was after I sent the emails, but we could check.
>
> And you see the description at the top of page 14,876:
>
> *I thought the drop dead date on contract was July.*
>
> ?---Yes.
>
> Now, that's different from what you had told Mr Matthys only a little while before, wasn't it?---I think things are pretty much exactly the same, isn't it?
>
> Well, I understood that you did not accept that you were talking about the end of the contract when you were emailing Mr Matthys, you were talking about the removal of Benzac from the shelves? That's how I understood it as?---Correct, which in - in our conversation I was then informed was, we were now talking about a termination agreement. That was what he told me it was.
>
> Well, that's a lie, isn't it?---What's a lie, sorry?
>
> That piece of evidence is a lie, because - - -?---No, it's not.
>
> - - - you are now saying to Dr Castella, 'I thought the drop dead date on the contract-' not, Benzac, 'on the contract, was July'?---No, I'm just explaining. I - prior to discussing with Matthys, I was not aware of a termination agreement. I was not aware of any agreement to terminate. I was aware of the fact that Galderma had - was piling on the pressure, as he said, to kick it down the track. I thought it had been kicked down the track until the middle of the year when the whole decision on Benzac would be made. And then, out of the blue, I get a call from a very panicked Julius who, I don't know how many times he said to me, 'Castella is saying that it hasn't been terminated when it says it has'. He signed a termination contract.
>
> Yes?---So that is where I am informed to speak about contracts and termination. Up until then I knew nothing about it.

> 'I thought the drop dead date on contract was July', that's completely inconsistent with the evidence you've just given?---No, it's not. It's - it's completely consistent with me saying that I thought this whole thing was going to be determined in July, in the middle of the year.
>
> The 'whole thing' being Benzac coming off the shelves, on your evidence yesterday?---Well - well, now I'm - I'm sending this text after I've just had a panicked conversation, and I'm very well aware by now of what is actually the case.
>
> 'I thought the drop dead date on contract was July'?---Yes.
>
> That's what you say?---I - - -
>
> I'm giving you every opportunity to explain how that is consistent with your evidence that you have given?---With respect, totally consistent.
>
> Okay?---I was under the impression that the whole Benzac matter had been kicked down the road to the middle of the year, whether that was - I didn't know whether it was 30 June or 1 July or what, but it was pretty close. And I am not aware of any contractual provisions being altered, amended, agreed to at all until I have the conversation with Matthys where it's all about termination. How can you say and reading it out to me, that is when I became informed of anything to do with contractual terminations, contracts, full stop.

396 This evidence from Mr Wilson resolves to an assertion that his evidence that he thought that Galderma had been piling on the pressure to discontinue Benzac, but had no knowledge of termination of the Galderma Agreements, was consistent with his text message to Dr Castella. He relies, yet again, on the fact that Mr Matthys referred to the Termination Agreement in their conversation on 9 May 2017. I do not accept this evidence. Mr Wilson's text message was referring to his state of knowledge about that in the past tense ('I thought'), and in context it is conveying that the past state of knowledge was different to the one he now had (on his account) after talking to Mr Matthys on 9 May 2017. So Mr Wilson is clearly talking about his state of knowledge *before* Mr Matthys contacted him on that day. And he is saying that the previous state of knowledge included knowledge of a 'drop dead date' - a date that was set firmly for something to end - and that what was going to end on that date was 'the contract', which could only be a reference to the Galderma Agreements or, if 'on' was a typo for 'in', to the Termination Agreement. Either way, the ordinary meaning of the text message implies that Mr Wilson knew before Mr Matthys spoke to him that the Galderma Agreements were going to come to an end, without possibility of revival, in 'July', clearly July 2017. Mr Wilson's cross examination evidence just set out provides no reason to depart from this understanding of the meaning of the text message.

397 After his discussions with Dr Castella and Mr Matthys on 9 May 2017, Mr Matthys instructed his staff to conduct 'a physical search of Quintis' business records to determine whether Quintis

had received a copy of the Termination Agreement' before FTI Consulting made it aware of the Australian Financial Review journalist's questions on 9 May 2017. No such hard copy was found. Mr Matthys himself 'physically searched' Mr Wilson's office at the company's offices at the Old Swan Brewery, which by that time Mr Matthys himself occupied, but he was unable to find any copy of the Termination Agreement. Physical and electronic searches which Quintis conducted in response to ASIC compulsory notices also did not turn up any copy of the Termination Agreement.

Quintis makes releases to the ASX about the Termination Agreement

398 On 10 May 2017 Quintis made an announcement to the ASX with the heading 'Update on Galderma contracts' (Exh 845). It said:

> Quintis (ASX:QIN, 'the Company'), the world's largest owner and manager of commercial Indian sandalwood plantations, today provides an update on its contracts with Galderma.
>
> In February 2014, Santalis Pharmaceuticals, which has been a wholly-owned subsidiary of Quintis since August 2015, signed contracts with Galderma, a subsidiary of Nestle. These contracts covered the licensing of acne products created by Santalis and the supply of pharmaceutical-grade East Indian sandalwood oil ('EISO') to be used as a key ingredient in the products. Galderma launched its new over-the-counter anti-acne product formulation, Benzac® Acne Solutions ('Benzac'), containing EISO, in the USA in January 2015.
>
> Quintis has supplied over 1,200 kg of EISO to Galderma under the supply contract, with all supplies occurring in the 2014 and 2015 calendar years. In March 2016 Nestle entered into an agreement to acquire a majority stake in Proactiv, the world's leading non-prescription anti-acne brand. Quintis has not supplied any EISO to Galderma in FY2017 and EISO sales to Galderma have not been factored into the Company's sales forecasts for FY2017.
>
> The Board of Quintis was advised late yesterday that on 16 December 2016, Santalis and Galderma entered into an agreement that terminated Galderma's licensing and supply arrangements with Santalis with the termination to take effect from 1 January 2017. Under the termination agreement, Galderma retained an option to reinstate the license and supply arrangements on or prior to 1 July 2017.
>
> Prior to yesterday's advice, the fact and details of the contract termination had not been provided to current members of both the Board of Quintis and its senior management (outside of Santalis).
>
> Quintis Chairman, Dalton Gooding, said: 'It is unacceptable that the current Board was not made aware of the contract termination when it took place. We are taking immediate and appropriate measures to ensure that this type of communication breakdown is not repeated.'
>
> The over-the-counter acne products form only one part of Santalis' business. Santalis currently has four products, containing pharmaceutical-grade EISO, in FDA-approved Phase 2 trials to treat psoriasis, molluscum contagiosum, eczema, and oral mucositis and expects to initiate Phase 3 trials for a product to treat HPV skin warts within twelve months.

399 At some time after this, Mr Matthys had a discussion with Mr Wilson regarding Dr Castella's claim that he had given Mr Wilson a hard copy of the Termination Agreement when he was in Perth to attend the Quintis Board meeting on 24 February 2017. According to Mr Matthys, 'Mr Wilson stated words to the effect that if Mr Castella had handed him the Termination Agreement, then he did not read it and likely threw it away'.

400 On 10 May 2017, ASX sent Quintis a letter asking detailed questions prompted by the disclosure of the Termination Agreement and other things Quintis said in the release to the market on that day.

401 Quintis shares opened for trading on 10 May 2017 at $0.85 and closed at $0.60.

Mr Wilson and Dr Castella exchange more text messages

402 On 13 May 2017, Mr Wilson sent Dr Castella a text message which read:

> You should ask John bray what the prospects are of suing Galderma for breach of confidentiality, or offering them a chance to publicly support your view that the agreement was not intended to be final until a decision was made in July, or they reinstate it in July. I think this is a clear cut case of breach and they may feel exposed and may cooperate to avoid public scrutiny about their legal ethics.

Dr Castella replied saying that he had suggested it to Mr Matthys but did not get anywhere and that he would run it past Mr Bray. Mr Wilson replied:

> It will protect your and everyone's position, and you are [the] right person to approach them as they signed with you not Quintis
>
> Legally pressuring Galderma to rectify/amend their position is the solution to all your/our issues and is where you should be putting ALL your focus and energy

403 A couple of hours later Dr Castella said he had spoken to Mr Bray, who agreed that there was a case, and Mr Wilson asked for Dr Castella's permission to speak to Mr Bray direct 'because Quintis will be too slow and won't go for [the] jugular and they won't be capable of getting the result'. Dr Castella gave him Mr Bray's telephone number.

404 On 14 May 2017, Mr Wilson sent Dr Castella an email (which he intended to be forwarded to Mr Bray) in which Mr Wilson said, among other things, that he had not seen the Termination Agreement.

Quintis shares are suspended on ASX

405 On 15 May 2017, at Quintis's request, ASX placed the company in a trading halt pending the release of 'an announcement of the impact of market and trading conditions on the Company's expected financial results and strategic outlook' and the company's response to ASX's questions of 10 May 2017.

406 On 17 May 2017, also at Quintis's request, its shares were suspended from official quotation pending the release of an announcement to the market. The reason given for the request was that it was (Exh 871):

> necessary for the Company to manage its continuous disclosure obligations whilst:
>
> a. the Company finalises its response to an ASX Aware Query received from the ASX on 11 May 2017;
>
> b. the CEO continues with a review of the Company's operations and outlook which needs to be updated in light of the recent decline in the Company's share price, in order to finalise an updated announcement of the Company's earnings guidance; and
>
> c. the Company determines its response to recent publications regarding the Company's outlook.

Quintis makes several announcements.

407 On 6 June 2017, Quintis responded to the ASX's queries of 10 May 2017. Relevantly, the response said:

(1) Quintis did not consider the information that it had not supplied EISO to Galderma since 2015 to be material information, essentially because the volumes supplied and revenue earned from that supply were only a small percentage of Quintis's total sales revenue in FYE 2014 and 2015.

(2) The release gave an account of the events leading up to the Termination Agreement which claimed, among other things, that the current Board and current senior management team of Quintis were not aware of either Galderma's intention to terminate the Galderma Agreements or the making of the Termination Agreement until 9 May 2017.

(3) In answer to a question that asked, in effect, whether Quintis considered that the Termination Agreement was material information, Quintis said:

> Quintis considers that if the current Board and current senior management had been aware of the Termination Agreement at the time it was signed, it is likely that the Company would have made an ASX announcement to that effect. This is

not because the Company considers that the information represented by that Termination Agreement was information that a reasonable person would expect to have a material effect on the price or value of Quintis' securities, but instead to inform the market about the status of a contract that, whilst economically immaterial, had previously been the subject of direct announcement by, and media commentary on, Quintis.

(4) In a subsequent answer, the company expanded on that as follows:

> Quintis does not consider that the agreement that terminated Galderma's licensing and supply arrangements with Santalis to be information that a reasonable person would expect to have a material effect on the price or value of its securities for the following reasons:
>
> - Oil sales to Galderma under the contract contributed 1.5% of total sales revenue in FY14, 2.5% of total sales revenue in FY15 and 0% of total sales revenue in FY16 and, as a result, these sales are not considered material to the financial position of Quintis;
> - Quintis supplies sandalwood (Spicatum and Album) oil and wood products under multi-year contracts to a variety of buyers across a range of both markets and countries. The volumes and monetary value of the sale of oil to Galderma were not in themselves material to the Group's results; and
> - Santalis' management is in ongoing discussions with Galderma regarding the development of Santalis' Rx (prescription) indications. Galderma has indicated potential interest, subject to the on-going FDA clinical trials, to be a future commercial partner of Santalis on these dermatology products.

408 In a 'Trading Update' announcement on the same day, Quintis told the market (along with many other things) that its financial report for the six months to 31 December 2016 included an intangible asset of AU$7.9 million relating to 'the Galderma supply agreement' (it is not clear whether this encompasses both the licence agreements and the EISO supply agreements that together comprised the Galderma Agreements). It said that this intangible asset would have been written off at 31 December 2016 had the cancellation of 'the Galderma contract' been known to the current Board of Directors and current senior management when that financial report was finalised. This non-cash write-off would have reduced Quintis Group profit before income tax by AU$7.9 million and group net profit after tax and net assets by AU$5.1 million.

Class actions are commenced

409 On 7 September 2017, shareholders of Quintis commenced a class action in this Court (matter number NSD 1568 of 2017), alleging that Quintis breached its continuous disclosure obligations under the *Corporations Act* and the ASX Listing Rules. The claim relates to the delay in disclosing the Termination Agreement. The statement of claim filed in the matter alleges that the information regarding Galderma's intention to terminate and the subsequent

execution of the Termination Agreement was information concerning Quintis that a reasonable person would expect to have a material effect on the price or value of Quintis shares, which was not disclosed, in contravention of s 674 of the *Corporations Act*. The applicant and group members claim to have suffered loss and damage from the share price drop of approximately 44% following the disclosure of the Termination Agreement.

410 Another class action was commenced in November 2017 (matter number NSD 1983 of 2017). This also includes allegations concerning non-disclosure of matters regarding the Galderma Agreements in contravention of s 674 of the *Corporations Act*. The applicant and group members claim they are entitled to relief because they bought shares in Quintis as a result of mistaken beliefs attributable, in part, to the alleged contraventions of s 674. They also claim misleading or deceptive conduct in breach of s 1041H, but the release of the 27 March Response, and any representations made in it, are not part of that alleged conduct.

Quintis goes into administration

411 On 20 January 2018, Quintis was placed into administration under Part 5.3A of the *Corporations Act*. The evidence does not reveal exactly why. On 23 January 2018, receivers were appointed. It appears that a deed of company arrangement was entered into in June 2018. The evidence did not reveal the current state of affairs in relation to the company as at trial.

VI. TWO EVIDENTIARY MATTERS

412 Before the issues can be resolved I need to address two important subjects of evidence: one to which I return, and another yet to be introduced. They are Dr Castella's credibility as a witness, and the admissibility of Mr Bowers' evidence.

Dr Castella's credibility

413 While I made observations about Dr Castella's credibility at the beginning of this judgment, and have made further comments throughout, it is necessary at this point to bring together and summarise the view I have taken of the reliability of his oral and written evidence. That is because as will be seen, that view has proved crucial to the outcome of this case. It is not similarly necessary to return to the subject of the credibility of Mr Wilson because, although I did not find him to be a satisfactory witness either, in the end much of the case turns on whether the evidence led by ASIC discharges ASIC's burden of proof.

414 It will be clear by now that I did not find Dr Castella to be a credible witness. That is not because I found his evidence inherently implausible; I did not. Nor is it because of his

demeanour in the witness box, as unsatisfactory as that often was. Nor is it because I came to the view that Dr Castella was knowingly or deliberately misleading the Court; I have not come to that view. It is because the manner in which Dr Castella gave evidence - specifically, his choice of words, and the content of what he said - showed him to have had a cavalier approach to the accuracy of the evidence he was providing to the Court. Numerous examples of this appear above. The following discussion of a point which Mr Wilson's submissions addressed in painstaking detail - Dr Castella's omission to disclose the termination of the Galderma Agreements to anyone at Quintis - illustrates further why I have come to these views.

415 Apart from Mr Wilson, and setting aside Mr Traa's email of 18 January 2017, which I have addressed at [314] above, there is no suggestion in the evidence that Dr Castella told anyone at Quintis that Galderma wanted to terminate the Galderma Agreements, or that it had done so, at any time before this became common knowledge on 9 May 2017. In his oral evidence in chief, Dr Castella confirmed that before that date, he did not tell anybody on the Quintis Board about the Termination Agreement, apart from Mr Wilson, or anyone else at Quintis. His explanation in evidence in chief was (ts 84):

> Frank wanted to - was very clear that he wanted to manage the process by which this was disseminated and so I - I left it to him to manage it. And then, essentially, it didn't come up again, so there was no real venue for me to say this.

416 Mr Wilson's submissions appeared to draw a contrast between this and evidence that Dr Castella gave in cross examination. First, there was the evidence prompted by Mr Traa's email as described above, on the basis of which Dr Castella said that he knew that by 18 January 2017 certain people at Quintis knew about the situation with Galderma. He also asserted that the rest of his team at Santalis had no restrictions placed on them as to what they could or could not say on that subject and he appears to have implied that they, the people at Santalis, knew about the termination. He referred to Mr Coetzer's visit to San Antonio in January 2017 in that regard and said that he had 'always maintained that it was staggering to me that these people have claimed that they don't know' (ts 213).

417 But after an adjournment, Dr Castella said that the email of 18 January 2017 was not the sole basis for saying that he was aware that people at Quintis (leaving aside Mr Wilson) knew about the termination of the Galderma Agreements. He then gave the following evidence (ts 216):

> … My statement - it has been put to me throughout the course of this since it first kicked off in 2017 through all this process, that people at TFS and, specifically, Mr Wilson did not know about the Galderma termination agreement. And I've been

> asked this, obviously, in due course by Julius, and Alistair and many people at Quintis. I have talked to my team about this situation. And it's clear that the position of the people at Quintis is they did not know and my team's position when they hear that is - well, the reaction I get is that the idea is laughable. And my supposition that they knew is based on the totality of all the evidence, of all the interactions I have ever had with them, and it has been very frustrating to me that this interaction, this evidence has proved elusive to pin down in email … And what I am stating is that, at the very least, it demonstrates that Mr Wilson is aware through this email of the situation with Galderma. And this is in my opinion written evidence of what I have been trying to state has been my position, my position of my entire team and so when it came to me this afternoon, I brought it with me to present at the appropriate time.

418 And then, referring again to the email of 18 January 2017 (ts 217):

> This is - this is the type of correspondence that me and my team were exasperated could not be found to document many aspects of the interactions across TFS. I have been asked repeatedly, 'did you tell so and so' and my response has been 'I assume they knew' or 'why didn't you tell them'. I have been under the assumption that everyone knew so therefore it's a dead matter, and yet going on these assumptions, I - in this process obviously have been asked to back myself up. How do I show this? And this is my way of showing you that the situation, certainly by the time of this email, was made evident to this group of people.

419 Later still, when challenged about whether he deliberately concealed the Termination Agreement from Mr Stevens during the roadshow in January 2017, Dr Castella said (ts 231):

> He didn't bring it up to me. He didn't - he didn't say anything to me, even though he should have been fully aware of all the circumstances leading up to this. And as in the document that I provided [Mr Traa's email], and I guess we will get to at some point, major portions of the team were well aware of it. So the fact that he - I assumed he knows because I assume everyone knows because Frank has told them …

420 Dr Castella denied that it was a subject that was bound to come up during the roadshow because the presentations to investment banks (ts 231):

> (1) were not predicated on Galderma and, (2) if there were no public disclosure at that point by Frank and Quintis or TFS, or whatever it was called at the time, I probably wouldn't have taken it upon myself to disclose it. But I certainly wouldn't have - if someone had said to me and asked me the direct question, we would have had a different discussion.

421 Later he said that his basis for thinking that Mr Stevens knew during January was 'the logical assumption that Frank would have told the people at Quintis the situation' (ts 235).

422 Mr Wilson submitted that the totality of Dr Castella's evidence on this point was 'glaringly improbable' and 'plainly untruthful'. But I do not accept that it was improbable and, to the extent that it is submitted that Dr Castella was deliberately and knowingly giving false evidence, I do not accept that either. I do accept that his evidence was vague and shifting.

Sometimes Dr Castella appeared to be saying that he knew for a fact that unspecified others at Quintis knew about the termination, based on the 'totality' of all the interactions he had with them. At other times he called it a 'supposition' or 'assumption'. This illustrates his unduly casual approach to the accuracy of his evidence.

423 But there is nothing implausible or improbable about what he was saying, and no real basis in the evidence to say that he was lying to the Court. On his version of events, he thought Mr Wilson was going to disseminate the information that the Galderma Agreements had been terminated as and when he thought fit. As time passed he is likely to have assumed that this had occurred. That assumption may have led him to have understood statements, like the one in Mr Traa's email, to have greater significance than they might have had to others. There is nothing improbable about this. It is ordinary human behaviour.

424 Nor do I consider that matters were significantly advanced by Mr Wilson's attempts, in cross examination and submissions, to paint Dr Castella as dishonest because he did not tell Mr Stevens about the termination during the January roadshow, or tell Mr Coetzer about it when he visited San Antonio in January 2017. In relation to the roadshow, Dr Castella's evidence was that it did not come up. Contrary to Mr Wilson's submissions, this is plausible. Dr Castella says that the roadshow was not predicated on Galderma. There is no basis in the evidence to disbelieve that; there are indications that for an IPO, the focus was on Rx rather than OTC opportunities. Mr Wilson submitted that Mr Stevens gave evidence that he was present at multiple meetings with shareholders and Dr Castella where Benzac was discussed in the context of Galderma's acquisition of Proactiv. In truth, Mr Stevens' evidence was that, in relation to options including whether EISO would be included in Proactiv's product, 'I was in multiple meetings with shareholders, with Mr Wilson, with Dr Castella when that was the consistent message that the company was giving in January and February '17' (ts 330). This does not refer to the meetings with investment bankers which were the subject of the roadshow.

425 In relation to Mr Coetzer, Mr Wilson's submissions focussed on evidence that Dr Castella gave during cross examination, addressed above at [351], that he had heard a conversation at the Red Robin restaurant in San Antonio where Mr Levenson (Santalis's Chief Scientific Officer) said that it was a shame about the Galderma deal being cancelled and Mr Coetzer saying words to the effect 'Yes, [it] is a shame. We will definitely have to replace that' (ts 236). But Mr Coetzer, who I accept was giving his evidence honestly, said that the subject of termination of the Galderma Agreements did not come up during his visit to San Antonio in January 2017.

However from his cross examination it appeared that his own recollection of what he knew about the significance and status of the Galderma Agreements and about the repurchase of EISO by Galderma at that time (January 2017) was vague; it was not a subject of importance to him. As stated above, Mr Coetzer was not asked about Dr Castella's evidence about the lunch, even though Dr Castella had given that evidence before Mr Coetzer gave his. I do not know whether Dr Castella invented the story out of thin air, or whether it was an embellishment of something that was actually said, or whether Mr Coetzer simply did not remember it.

426 That is not to say that any of this reflects well on Dr Castella. There are at least two respects in which it does not. First, to the extent that Dr Castella was seriously giving evidence on important matters based on this mixture of assumption and supposition it does, as I have said, manifest a cavalier approach to the accuracy of his sworn evidence. Second, I infer that much of his evidence stemmed from a desire to provide self-serving justifications for his complicity in what, on his version of events, was Mr Wilson's plan to 'manage' the dissemination of the information within Quintis. Section VII(13) below addresses the evidence as to whether, in the course of events narrated in Section V, Dr Castella ever gave a false answer to a direct question. I do not conclude that he did. But it is clear that he did not, to adapt his own words quoted above, take it upon himself to disclose the true position in relation to the Galderma Agreements. This shows a lack of candour and, on Dr Castella's own version of events, a willingness to abet Mr Wilson's concealment of the matter from others at Quintis.

427 But it does not, in short, make Dr Castella a liar. There is no need to go further than to express agreement with the characterisation of Dr Castella given by senior counsel for Mr Wilson as 'the archetypal witness in respect of whom no finding can be made based on his evidence unless it is corroborated' (ts 783). I make that finding on the basis of the unreliability of Dr Castella's evidence, as distinct from its honesty.

428 More broadly, Mr Wilson's comprehensive attempts in submissions to paint Dr Castella as being deceitful in his dealings with Quintis officers and staff other than Mr Wilson himself do not help the Court to resolve the substantive factual issues in dispute. Dr Castella could have kept silent about the termination because he was concealing it from Mr Wilson and everybody else at Quintis, or he could have been keeping silent about it because Mr Wilson had asked him to conceal it. The mere fact that Dr Castella did not tell other people about it when, perhaps, he had an opportunity to do so, does not help to decide which explanation is the true one. For example, Mr Wilson's submissions make much of Dr Castella's omission to mention the

termination at the two board meetings in February 2017. But Mr Wilson was at those meetings too. If Dr Castella's version of events is correct, Mr Wilson should have spoken up, but did not; if Mr Wilson's is correct, Dr Castella should have, but did not. The fact that no one spoke up sheds no light on which version is correct.

429 In his submissions, Mr Wilson tried to break this impasse by saying that Dr Castella's evidence that he left it to Mr Wilson to disseminate the information about the termination of the Galderma Agreements was inconsistent with Dr Castella's 'clear evidence' that he assumed that everyone already knew. But the two propositions are not inconsistent. He could have assumed that everyone knew because he assumed Mr Wilson had told them. On his version of events, it is likely that he was unsure whether they knew and so did not want to bring it up for fear that Mr Wilson had not, in fact, told them. I have set out Dr Castella's evidence about this in some detail above because it shows that contrary to Mr Wilson's submission, it was not 'clear evidence' at all.

430 In the end, I do not need to make a firm finding about why Dr Castella did not tell anyone at Quintis (apart from Mr Wilson) about the Termination Agreement. Only if I were satisfied that it was because he wanted to conceal it from Mr Wilson (and I am not) could it bear directly on any of the issues in dispute. Other than that, it goes only to Dr Castella's credibility as a witness, a subject on which it is already clear I have unfavourable views. Save in that indirect way, it has no bearing on the resolution of the main factual issues in dispute. In the end, I found Dr Castella's explanations for why he did not tell anyone at Quintis (apart from Mr Wilson) about the termination to be plausible, even though they did not reflect well on him, in the ways I have outlined. There is no need to go further than that.

431 As a final observation on this subject, it is important to recall that to characterise a witness as not credible, whether because the witness is not honest, or not reliable, or both, is not the end of the matter. As Besanko J said in *Roberts-Smith v Fairfax Media Publications Pty Limited (No 41)* [2023] FCA 555 at [225], 'In assessing the credit of a witness, it is necessary to have regard to the whole of the witness' evidence while at the same time recognising that the witness may be correct as to one matter and mistaken as to another, or truthful as to one matter and dishonest as to another'. As will be seen and as I have already indicated, because of surrounding circumstances and the presence of corroborating material or its absence, as the case may be, I have ended up accepting Dr Castella's evidence on some matters, but not others.

The admissibility of Mr Bowers' evidence

432 Mr Wilson made two objections to Mr Bowers' evidence and submitted that if either were upheld, all of his evidence would be inadmissible. Nevertheless, with the consent of the parties Mr Bowers' evidence was received on a provisional basis subject to the objections. This section of these reasons addresses and determines the objections. In view of the nature of the objections, it will be necessary to describe Mr Bowers' reasoning in some detail. However since I have reached the view that Mr Bowers' reports are admissible, that description also serves to set out the contents of the reports for the purposes of my substantive consideration of them.

433 ASIC specifies Mr Bowers' relevant area of expertise as concerning the behaviour of investors in securities of Australian listed corporations, including decisions to acquire or dispose of securities, and how information may influence them.

434 According to ASIC's written submissions, it relies on Mr Bowers' evidence in relation to three matters (closing submissions para 351):

(a) its plea that, by the ASX announcements and other market releases considered above, Quintis represented to the market that the Galderma Agreements were significant agreements for Quintis and to the long term value of its business;

(b) the allegation that knowledge of the termination of the Galderma Agreements, if generally available, would have had a material effect on the price of Quintis's shares, within the meaning of s 674(2)(c) of the *Corporations Act*; and

(c) the allegation that if the information had been generally available, that would have caused many investors to value Quintis's shares at significantly below the prevailing price, caused many investors not to acquire Quintis's shares, and caused many investors to dispose of part or all of their holdings of Quintis shares.

435 It is unclear precisely how (b) and (c) fit into ASIC's pleaded case. ASIC does not plead, as a material fact, that knowledge of the Termination Agreement, if generally available, would have had a material effect on the price of Quintis shares and that this impacted the acquisition or disposal of those shares by investors. But ASIC seems to rely on Mr Bowers' evidence in respect of (b) and (c) to show what a hypothetical reasonable director in Mr Wilson's position would have done, and that Mr Wilson's conduct exposed Quintis to risk of proceedings. I will

proceed on the basis that Mr Bowers' evidence is relevant. There was no objection on the basis that it was not.

436 It was common ground that Mr Bowers' evidence was opinion evidence which, under s 76 of the *Evidence Act* is generally not admissible. Section 79(1) provides, however, that if a person has specialised knowledge based on the person's training, study or experience, the rule excluding opinion evidence does not apply to evidence of an opinion of the person that is wholly or substantially based on that knowledge. Within that context, the two objections made by Mr Wilson to Mr Bowers' evidence are on the basis that he satisfies neither of the two conditions for admissibility found in s 79(1), that is:

(a) Mr Bowers does not have specialised knowledge based on his training, study or experience; and

(b) the opinions Mr Bowers expresses are not wholly or substantially based on that knowledge.

437 In relation to the first of these conditions, Mr Wilson's submission draws a distinction between specialised knowledge in relation to securities of companies in the mining industry, and specialised knowledge in relation to securities of companies in the pharmaceutical, health care and biotech industries. Mr Bowers may have specialised knowledge based on his training, study or experience in relation to the first of these fields, but not the second, and, Mr Wilson says, Quintis is a company in the pharmaceutical, health care and biotech industries.

438 In relation to the second condition of admissibility, Mr Wilson submits that, at a crucial point, Mr Bowers' reasoning is opaque, so that the Court has no basis on which to evaluate it. That point is Mr Bowers' view that, had the information about the termination of the Galderma Agreements in December 2016 been generally available, it would have caused many investors to reduce their valuation of shares in Quintis by at least 10% and probably considerably more. Mr Wilson submits, in essence, that although this is a quantitative conclusion apparently derived from a quantitative valuation process which Mr Bowers describes in the abstract, he makes no attempt to apply that process to the particular matter at hand, so that the Court cannot see how he reached the view that investors would reduce their valuation of Quintis by at least 10% and probably considerably more. Mr Wilson therefore submits that ASIC has not established that Mr Bowers' opinion in that regard is based on his specialised knowledge (assuming that the Court accepts that he has relevant specialised knowledge in the first place).

439 In order to assess these contentions, it is necessary to describe both Mr Bowers' experience, and his reasoning process as revealed in his written and oral evidence. Two affidavits by him were admitted into evidence subject to the objections just described: an affidavit affirmed on 21 December 2018 containing a report dated 20 December 2018 (**LB1**), and an affidavit affirmed 30 August 2021 containing a supplementary report (**LB2**). He also gave some evidence in chief in the witness box and was cross examined.

440 It is convenient before discussing these matters to set out the six questions that were asked of Mr Bowers: the first five addressed in LB1; and the sixth a supplementary question that was the subject of LB2. They were:

> 1. Describe the persons you would have expected to have commonly invested in securities of listed corporations in Australia in the period between 16 December 2016 and 19 December 2016 (both inclusive) (**Relevant Period**) (the persons that you have identified in answer to this question are collectively referred to in the following questions as **Relevant Investors**).
>
> 2. During the Relevant Period, how did Relevant Investors typically determine whether to acquire or dispose of securities of listed corporations in Australia?
>
> 3. During the Relevant Period, would knowledge of the execution of the Termination Agreement, if that information had been generally available, have been likely to influence Relevant Investors in deciding whether to acquire or dispose of Quintis Securities?
>
> 4. During the Relevant Period, would knowledge of the execution of and terms of the Termination Agreement, if that information had been generally available, have been likely to influence Relevant Investors in deciding whether to acquire or dispose of Quintis Securities?
>
> 5. During the Relevant Period, would knowledge of the execution of and terms of the Termination Agreement have been likely to influence Relevant Investors in deciding whether to acquire or dispose of Quintis Securities if the following information disclosed by Quintis on 6 June 2017 in its announcement titled 'Response to ASX Query' had also been generally available during the Relevant Period:
>
> > …Quintis, through its now wholly owned, US-based pharmaceutical subsidiary Santalis Pharmaceuticals ('Santalis'), supplied over 1,200 kg of EISO (the Company's East Indian Sandalwood Oil) to Galderma under the supply contract signed in February 2014. All supplies occurred in the 2014 and 2015 calendar years. Oil sales to Galderma contributed 1.5% of total sales revenue in FY14 and 2.5% of total sales revenue in FY15. Quintis supplies sandalwood (Spicatum and Album) oil and wood products under multi-year contracts to a variety of buyers across a range of both markets and countries. The volumes and monetary value of the sale of EISO to Galderma were not in themselves material to the Group's results in those years and therefore not receiving subsequent orders was not in itself considered to be price sensitive information. The supply agreement with Galderma did not contain fixed or minimum quantities of supply and therefore Galderma had no obligation to acquire Quintis' oil.

6. Would your answers to Questions 1 to 5 … differ if the Relevant Period was extended from 19 December 2016 to 27 March 2017 (**Extended Relevant Period**)?

Mr Bowers' field of specialised knowledge

441 A brief description of Mr Bowers' experience has already been given in Section III above. He holds a Bachelor of Commerce/Bachelor of Laws from the University of Western Australia, graduating in 2002, with majors in Commerce of Finance and Accounting. He then worked as a mining equities analyst for approximately nine years, (at Macquarie Bank and at Royal Bank of Canada), then in a specialist mining equities sales and trading role at Macquarie for under a year, then for five years (as at the date of his first report) at Fivemark Partners, the business he co-founded. Approximately two of his years as a mining equities analyst were spent as Head of Australian Mining Research at Macquarie.

442 According to Mr Bowers, the core of his role as a mining equities analyst involved the ongoing coverage and evaluation of ASX-listed Australian mining and exploration companies as investment prospects. That included detailed company analysis and valuation followed by regular updates about the companies as new information came to light. The clients who received this information were both institutional and retail investors.

443 According to LB1, Mr Bowers' role as a specialist mining equities salesperson (LB1 para 1.4):

> involved interaction with institutional investor clients in relation to investment advice (mostly stemming from key equity research pieces), trading strategy and implementation (including trade order receipt and transmission), issuance offerings, and broader market flows and observations.

444 The key daily aspect of both roles, Mr Bowers said, was (LB1 paras 1.5-1.6):

> impact analysis, including likely share valuation/price movement and market trading dynamics stemming from new informational factors. Both roles also provided direct and highly regular interaction with a wide spectrum of investors in the Australian equity market, domestic and international, including extensive exposure to their different investment processes and trading decision making criteria.
>
> My expertise is thus centred on investment analysis and trading dynamics in ASX-listed equities, most particularly mining and exploration companies. It includes asset evaluation and valuation (including financial modelling), corporate and asset benchmarking, new informational price/value impact and scenario/sensitivity analysis, investment advice and trading strategy, trading dynamics and the investment processes and trading decision making criteria of a wide range of Australian market investors.

445 In his present role as a corporate adviser and equity market consultant, Mr Bowers advises corporate clients, predominantly mining and exploration companies, on likely investor reaction

and share price movements in relation to the potential announcement of new pieces of information.

446 Mr Bowers thus summarised his experience as encompassing (LB1 paras 1.8-1.10):

> approximately fifteen years of direct interaction with a wide spectrum of institutional and retail investors based in Australia and internationally. The core of this interaction has been detailed discussion on the asset bases, growth prospects, management teams, shareholder registers and investment merits (including valuations) of various companies listed on the ASX. A key component has typically been advising clients on likely investor reaction and expected share price movement upon, or in anticipation of, the release of new elements of information.
>
> This interaction has taken many forms including physical meetings, telephone conversations, email exchanges, group presentations, requested bespoke analysis preparation and general research reports. In terms of indicative volumes, I would estimate that I have been involved in hundreds of large and small group presentations, hundreds of one-on-one physical meetings, hundreds of published research reports and thousands of telephone conversations and email exchanges with, or to, a wide range of equity market investors.
>
> Through this interaction I have gained extensive observation of, and insight into, the various investment processes and trading decision making of a wide range of investor groups and individuals. In particular, I have had a very large number of specific discussions with various investors on the detailed rationale for the specific timing, direction (acquisition or disposal) and magnitude of their trading in a particular company's securities.

447 It can be seen that Mr Bowers' own explanation of his experience places some emphasis on companies in the mining industry. He analysed them when he worked as a mining equities analyst and he then dealt with them in his role as a specialist mining equities salesperson. His own description of his expertise is that it is centred on ASX-listed equities, most particularly, but presumably not exclusively, mining and exploration companies.

448 In examination in chief, Mr Bowers was asked how he could express views in relation to Quintis, given that it is not a mining company. His answer was (ts 408):

> So, my expertise is with respect to ASX listed businesses. My specialisation is within mining and oil and gas exploration and development businesses, but it's certainly not, you know, the sole area that I do look at. I would describe TFS/Quintis as a natural resource business in some ways, and I would also describe it as having some characteristics which bear some similarity with exploration and development type businesses albeit, you know, those that tend to be in the earlier stage of development or should I say the earlier stage of output but into a ramping up or a sharply ramping up type volume profile as TFS and Quintis had.

449 In cross examination, Mr Bowers accepted that the 'vast majority' of his experience as a mining equities analyst at Macquarie was exclusively spent analysing mining equities. He confirmed

that the entire time that he was an equities analyst, he was a mining equities analyst. When he was a broker, the equities he dealt with were in somewhat wider categories, encompassing mining, oil and gas and, he said, 'it extended into kind of general natural resource concepts, but I think it's fair to say, you know, the - the great majority of the time was in the mining, oil and gas space' (ts 418).

450 Mr Bowers accepted that his expertise in relation to matters described on Fivemark Partners' website, 'capital markets, investor relations, company strategy, capital structure, resource asset evaluation and broader mineral and energy industry dynamics' were in the context of the 'mining and energy industries' (ts 419). He confirmed that the company's advertising highlighted their specialisation 'in what is quite a technical industry we are specialists and we make that point' but 'I would hate for it to be construed as my equities experience and my experience with listed businesses is so narrow as to encompass solely mining and oil and gas companies and understanding of those businesses and not have any relevance to any other sort of business might be in the listed market'.

451 Mr Bowers accepted that there were specialised analysts of equities in the pharmaceutical, biotech and healthcare industries, and he confirmed that he did not profess to be one of those. He did not discount the possibility of accepting instructions to advise in relation to those sectors but he appeared to draw a boundary between the technical aspects of those sectors, and what his business does, which is 'the presentation of the key attributes or messages that a business may have in the most investor-friendly format'. He confirmed that he had never produced a research report or published analysis on any company involved in the pharmaceutical industry or companies with a range of particular activities comparable to those of Santalis, such as treatments for psoriasis, eczema or mucositis. He accepted that there were analysts at Macquarie in relation to pharmaceutical or healthcare industry companies.

452 Mr Wilson thus submits that Mr Bowers' experience is not relevant to the matters on which he has expressed his opinions. The focus of his evidence, Mr Wilson says, was the opportunity for Quintis in the pharmaceutical industry, specifically via Santalis and ViroXis as developers of pharmaceutical products. Equity valuation and analysis of companies in that industry is highly specialised. Mr Bowers is specialised in a quite different industry. According to Mr Bowers' evidence, investors use different valuation methodologies depending on the type of business being valued. Many of them derive their valuations from third parties with relevant

expertise, such as equity analysts. Mr Bowers does not have the specialised expertise to assess the inputs that would be relevant to the valuation of a company in the pharmaceutical industry.

453 I do not accept these submissions, for two reasons. The first is that Mr Bowers' opinion evidence was about the likely behaviour of persons who commonly invest in securities in Australian equity markets, and not about the correct valuation of shares in Quintis. There is no suggestion in the evidence that the identity or behaviour of persons who, as a class, invest in mining, oil and gas companies, was likely to be materially different from the identity or behaviour of persons who invested in Quintis shares. Mr Bowers' own evidence did not identify any special class of investors in mining stocks with special characteristics that might distinguish them from investors in pharmaceutical stocks. The excerpts from LB1 set out above make plain that his work has exposed him to a very large number of observations of a wide range of equity market investors over a number of years. Mr Bowers' advisory practice specifically concerns how investors in Australian equity markets are likely to react to information of various kinds, and how that information may best be presented. While he accepted that he specialised in the mining and energy industry, he was careful to make clear that this was not the sole area he dealt with. In cross examination he said, in effect, that his experience of equities and of listed businesses went beyond mining and oil and gas companies, and that he considered that it was relevant to other listed companies.

454 In those circumstances, the submission that specialised knowledge and experience of the behaviour of investors in mining and energy stocks does not qualify Mr Bowers to express an opinion on the behaviour of persons who may invest in Quintis is not substantiated. I am comfortably satisfied that Mr Bowers has expert knowledge of the behaviour of investors in Australian equity markets generally, which class of investors included (and was not relevantly distinguishable from) the class of investors in Quintis. That is reflected by the fact that the first two questions Mr Bowers was asked to address in his expert reports were about the characteristics of persons who commonly invest in the securities of listed corporations in Australia.

455 The second reason I do not accept Mr Wilson's submission is that, even though the matters in issue relate in part to a pharmaceuticals business, Santalis, Mr Bowers' evidence was not about any characteristic of such businesses that would require specialised knowledge of the pharmaceuticals industry to assess. He was not asked to value any such business, nor was he asked how a matter specific to the pharmaceutical industry would affect investor behaviour.

He was asked, in essence, how knowledge of the Termination Agreement, or of its terms, would have been likely to have influenced persons who invest in securities in Australian equity markets.

456 Quintis was, relevantly to this issue, a supplier of sandalwood oil. The questions Mr Bowers was asked were about the termination of contractual arrangements for the supply of sandalwood oil for an OTC acne product and for the licensing of the use of that oil in that product, in return for royalties. They were not about the valuation of Rx prospects, about clinical trials or about the technical characteristics of any drug or substance.

457 Mr Bowers described Quintis as being a natural resources business in some ways and bearing similarities to exploration and development businesses. That evidence was not challenged or undermined in cross examination. The implied premise of Mr Wilson's objection - that it is necessary to have expertise in the pharmaceuticals industry in order to express an opinion about the likely behaviour of investors in Quintis - is not supported by the evidence or by the nature of the questions he was asked. The objection to the admissibility of Mr Bowers' evidence on the basis that he did not possess specialised knowledge relevant to the facts on which he was expressing an opinion, is overruled.

Whether Mr Bowers' opinion was based on his specialised knowledge and experience

458 Mr Wilson's second objection to the admissibility of Mr Bowers' evidence is that it does not demonstrate the intellectual basis of the conclusions he has reached, and so fails to comply with the prime duty of an expert to provide criteria that enable the Court to evaluate the validity of his conclusions.

Principles

459 The relationship between that objection and the requirement in s 79 of the *Evidence Act* that the expert opinion be wholly or substantially based on the expert's specialised knowledge is exposed by the following well-known passage from ***Makita*** *(Aust) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705 at [85] (Heydon JA) (emphasis added):

> In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of 'specialised knowledge'; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be 'wholly or substantially based on the witness's expert knowledge'; so far as the opinion is based on facts 'observed' by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on 'assumed' or 'accepted' facts, they must be identified and proved in some other way; it must be

> established that the facts on which the opinion is based form a proper foundation for it; *and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight.* And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in [*HG v The Queen* [1999] HCA 2; (1999) 197 CLR 414 at 428 [41]] , on 'a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise'.

460 This passage is the culmination of a detailed examination of relevant authorities. The need for the expert witness to explain the connection between the proven or assumed facts and the expert's conclusion is a theme that runs throughout that examination. At [59], Heydon JA referred to 'a prime duty of experts in giving opinion evidence' as being 'to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions'. His Honour also quoted the description of that duty given in *Davie v Lord Provost, Magistrates and Councillors of the City of Edinburgh* [1953] SC 34 at 39-40 as being 'to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence'. In *Makita* at [64] Heydon JA said 'The basal principle is that what an expert gives is an opinion based on facts … One of the reasons why the facts proved must correlate to some degree with those assumed is that the expert's conclusion must have some rational relationship with the facts proved'. And at [67], after considering the statement in *Ramsay v Watson* (1961) 108 CLR 642 at 645 that a jury cannot transfer to the witnesses their task of weighing and determining the probabilities, Heydon JA said, 'The jury cannot weigh and determine the probabilities for themselves if the expert does not fully expose the reasoning relied on'. At [68], after setting out some observations in *Steffen v Ruban* (1966) 84 WN (Pt 1) (NSW) 264; [1966] 2 NSWR 622, Heydon JA said, 'Underlying these observations is an assumption that the trier of fact must arrive at an independent assessment of the opinions and their value, and that this cannot be done unless their basis is explained'. It is not necessary to set out the further expressions of similar sentiments that appear in *Makita* at [71]-[72], [79]-[80] (taken from *Pownall v Conlan Management Pty Ltd* (1995) 12 WAR 370 at 389-390), [81]-[82]. See also *Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd* [2000] FCA 1463; (2000) 120 FCR 146 at [23].

461 While Heydon JA took the above principles from decisions concerning the common law of evidence, at [84] his Honour described Gleeson CJ, in *HG v The Queen* [1999] HCA 2; (1999) 197 CLR 414 at [39]-[44], as construing the relevant provisions of the Uniform Evidence Acts as enacting some of the central elements of the common law. Those paragraphs include Gleeson CJ's statement (at [39]): 'By directing attention to whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience, [s 79] requires that the opinion is presented in a form which makes it possible to answer that question'.

462 In *Makita* the issue for the Court about the expert opinion was weight, not admissibility, because the evidence had been admitted without objection. But the relationship between s 79 and the principles just summarised confirms that if expert evidence fails to comply with those principles, it is not admissible at all.

463 Nevertheless, the courts have been willing to display a degree of flexibility as to the extent of explanation required, depending on the nature of the matter on which the expert is giving the opinion. In *Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co* [1901] AC 373 at 391 (cited by Isaacs J in *Spencer v Commonwealth* (1907) 5 CLR 418 at 442 and by Pullin J in *Arcus Shopfitters Pty Ltd v Western Australian Planning Commission* [2002] WASC 174 at [77]) the Privy Council said:

> It is quite true that in all valuations, judicial or other, there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others. Everyone who has gone through the process is aware of this lack of demonstrative proof in his own mind, and knows that every expert witness called before him has had his own set of conjectures, of more or less weight according to his experience and personal sagacity. In such an inquiry as the present, relating to subjects abounding with uncertainties and on which there is little experience, there is more than ordinary room for such guesswork; and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at.

464 As I have said, Mr Bowers was not performing the task of a valuer, and I do not consider that the above passage detracts from the orthodox principles stated in *Makita*. It is, rather, a reminder that what counts as a proper exposition of the expert's reasoning process will always depend on the nature of the task and of the opinion being expressed.

Mr Bowers' reasoning

465 Against that background of principle it is necessary to assess the reasoning developed in Mr Bowers' two reports and his oral evidence. The questions he was asked have already been

set out. As already explained, it will be necessary to describe Mr Bowers' reasoning in some detail.

The general behaviour of Relevant Investors (Questions 1 and 2)

466 Mr Bowers' answer to the first question asked of him is relatively brief: he divides the class of persons who would have commonly invested in securities of listed corporations in Australia in the Relevant Period (as defined in the question asked, essentially, the days immediately following the execution of the Termination Agreement) into institutional and retail investors. Institutional investors are investment professionals who manage funds for investors. Retail investors are individuals investing on their own or their family's behalf. The latter category includes self-managed superannuation funds, so called 'mum and dad' investors, and high net worth individuals. Retail investors may transact through full service brokers and so receive investment advice, or they may transact through 'execution only' brokers and so receive little or no investment advice.

467 Mr Bowers places in the defined class of Relevant Investors all investors of the kinds described, provided that they trade at least annually, and in many cases, considerably more regularly. This includes almost all investment institutions, most high net worth individuals and many retail investors. They are located both in Australia and internationally. The range of financial sophistication they display is very broad. Professional investors, unsurprisingly, tend to be at the higher end of that range, and many retail investors will be at the other end (because, Mr Bowers says, they can be 'contrasted' with the professional investors).

468 Mr Bowers then goes on to consider the second question, as to how Relevant Investors typically determine how to acquire or dispose of securities of listed corporations in Australia. In answer to that, he draws a division between passive or 'index' investors, and active investors. The former hold a portfolio of securities in proportions relative to a given market index, such as the S&P/ASX 100. They tend for that reason to hold more securities in companies at the larger end of market capitalisation, as those companies have more representation on the indices. Passive investors do not need to make decisions about which securities to buy and sell, other than when they readjust their holdings to reflect changes in the relevant indices.

469 Active investors, by contrast, try to identify securities that are mispriced on the market. They may buy or sell depending on what is required to exploit the mispricing. That does not necessarily mean that they are frequent traders; some active investors will have long term horizons, and may hold stocks for many years. Mr Bowers' evidence goes on (LB1 para 6.5):

> In my experience, the processes and systems utilised in an attempt to identify mispricing take a wide range of forms, some of which are detailed valuation models, quantitative methods and technical (chart) trend analysis. However the predominant focus of most active investors is on the relative fundamentals of each listed corporation - including macro trends relevant to the business, forecast earnings and cashflow over coming years, expected rates of return on capital employed and equity, and estimated net present value.

470 Relevant Investors may get the information they use to 'calculate and evaluate such fundamentals' from a range of sources, including market announcements, proprietary platforms like Bloomberg, news media, online chatrooms and published equity analysis (which I take to include broker analyst reports). It is active investors, not passive ones, who tend to be influenced by new information in the market, so Mr Bowers' reports focus on that class of Relevant Investors.

471 Mr Bowers then introduces the concept of 'risk weighted valuation' which, he seems to posit, is employed by Relevant Investors in order to identify mispricing. Mr Bowers says, 'Practically, this means finding securities where the current share price differs materially from an investor's estimate of the current risk-weighted valuation for that security' (LB1 para 6.8). He gives simple generic examples, including where a Relevant Investor's risk-weighted valuation for a company is 80 cents per share and its share price is 50 cents. The investor will be motivated to acquire shares because it believes that the share is under-priced by the market. He gives another generic example where the investor's risk-weighted valuation is significantly lower than the market price (the numbers in the examples do not matter). Then, according to Mr Bowers, if the investor holds those shares it will be motivated to dispose of them because the investor believes that the security is overvalued by the market.

472 But, Mr Bowers then notes, these examples are what he calls a 'baseline characterisation' (perhaps another term would be 'abstraction') of evaluative processes that can be considerably more detailed or considerably less so. Mr Bowers goes on (LB1 paras 6.12-6.13):

> Particularly referencing the latter, some active investors have scant apparent regard to concepts of underlying valuation and may look simply to trade on the basis of expected impacts from near term informational newsflow - for ease of reference I will refer to these investors as 'newsflow traders'. Note that this term does not imply any sort of regularity, nor short investment horizon, in the securities trading of these investors - but simply that their acquisition/disposal decision making is governed by their perceived understanding of the likely price impact of particular informational newsflow.
>
> Newsflow traders seek to invest early in a short term directional share price move on the back of new information that has come to light. While newsflow trading may appear to carry no specific consideration of risk-weighted valuation impacts, it still

> inherently does by its very nature. In assessing whether the share price of a particular company is about to rise or fall on the back of new information, newsflow traders still practically assess (albeit possibly very briefly) at least the direction, and probably the rough magnitude also, of the anticipated average price/value impact in the market. Thus their acquisition and disposal decision making is still being guided, albeit lightly or unconsciously, by the general concept of risk-weighted valuation outlined above.

473 For that reason, Mr Bowers draws an explicit connection between the quantitative risk-weighted valuations that some Relevant Investors estimate in relation to a particular security and the less consciously quantitative process which, he says, newsflow traders go through when new information enters the market. On Mr Bowers' account, there is no division between investors who make a quantitative assessment and investors who do not. While newsflow investors may act on an intuitive assessment of the likely impact of new information on market price, the same concept of risk-weighted valuation still underlies that assessment. As a result, in Mr Bowers' view, the buying and selling behaviour of newsflow investors is likely to reflect the quantitative assessment of risk-weighted valuation made by other investors, even if the newsflow investors do not consciously make a similar assessment themselves.

474 As Mr Bowers then highlights, the range of factors that active investors feed into their evaluation of risk-weighted valuation is very wide. That is because the range of 'drivers impacting on general business performance and value' is typically wide, regardless of the market sector in which the business operates. It is also because any two given investors may put different significance or weight on any given factor. Here Mr Bowers seems to be referring to factors that are specific to particular industries, because he gives examples of the range of factors that may be relevant to a retail business and an oil and gas business respectively.

475 Further, Mr Bowers says that the valuation methodologies or practices that Relevant Investors may use can differ, and sometimes an investor may use them in combination. Examples he gives of more common valuation methods are:

(a) discounted cash flow modelling to arrive at net present value;

(b) peer earnings/cashflow trading multiples applied to forecast earnings;

(c) peer enterprise value trading multiples applied to forecast earnings-before-interest-tax-depreciation-and-amortisation (**EBITDA**) or forecast earnings-before-interest-and-tax;

(d) comparative resource/reserve base trading multiples of peer companies;

(e) average free cash flow or dividend yield comparables; and

(f) average historical return on invested capital or return on equity in that industry.

476 The appropriate methods to be used may depend on the nature of the business. And the choice of methods will impact on the estimate which the investor makes. In other words, and subject to a point made further below, Mr Bowers does not suggest that these different methods all converge on some single 'true' value. The range of inputs the investor uses will also, of course, influence the risk-weighted value at which the investor arrives. So Relevant Investors may arrive at different estimates of current risk-weighted values.

477 Many Relevant Investors will not engage in this valuation exercise themselves, but will rely on the advice of third parties who have engaged in it, such as equity analysts who publish reports, stockbrokers who give advice, or investment bloggers. Or, as another example given in the case of some Relevant Investors, gossip, albeit gossip about how a security may be valued. Investors who rely on third parties do not make their own specific estimation of risk-weighted value; they accept the advice of trusted third parties, including when that advice itself does not communicate a specific valuation.

478 Mr Bowers then runs through a more detailed hypothetical example of the valuation of a listed company that sells premium consumer goods to a range of wholesale customers. A Relevant Investor might value that company using a price to earnings valuation methodology which leads it to attribute a value of 16 times the current year earnings guidance. If the outcome of that calculation is significantly less than the market capitalisation, the investor may be motivated to dispose of shares in the company (again, the numbers Mr Bowers uses to illustrate this do not matter). But if the company announces, unexpectedly, that it is going to start producing a new line of high-tech and high profit-margin goods, and that it already has a 'flagship customer' signed up to accept most of the new products at the company's targeted price, then the investor may revise the risk-weighted valuation upwards. It may do so by revising the estimate of earnings or, as is more likely, by revising the earnings multiple upwards, say from 16 times to 19 times the current year's earnings guidance. If the result of that calculation exceeds market capitalisation by a significant amount, the investor may be motivated to buy shares in the company.

479 According to Mr Bowers (LB1 para 6.33):

> It is important to note that the same sort of impact would be expected even if the Relevant Investor in question was utilising a different valuation methodology. For example, if a discounted cashflow (DCF) method was being employed, the value increase would simply be driven by higher forecast volumes and prices/margins delivering higher forecast cashflows in future years.

480 That is the point I said was to be made further below, which qualifies Mr Bowers' apparent view that different valuation methodologies do not converge on a single true valuation. The 'impact', which I understand to refer to intentions held by Relevant Investors to dispose of or acquire shares, as the case may be, will occur regardless of the valuation methodology used. Mr Bowers also repeats that even where investors have a simpler or briefer approach to the example given, for example newsflow traders, 'this general framework is typically still highly predictive of their likely actions' (LB1 para 6.34).

481 At this point Mr Bowers then introduces another concept in his discussion of Relevant Investors, in order to answer a question about how 'the aggregate class of Relevant Investors', as distinct from a single one, arrive at their decisions to acquire or dispose of shares. He says that the 'answer lies at the margin', in that 'the last traded price per share/security of a company implicitly reflects the intersection (or overlap) of the current risk-weighted equity valuations of the marginal buyer and marginal seller of that company's securities' (LB1 para 6.36). Mr Bowers explained in his oral evidence in chief that 'if there is a new piece of information which causes relevant investors to significantly reassess their view on risk-weighted value of a particular security in question, then naturally it will influence the behaviour of investors if that view is sufficiently close to the margin' (ts 411). He runs through the hypothetical example of a 'depth/orders' screen for a particular security on the electronic market platform. There might be a range of buy orders at declining prices starting at a maximum of $0.99 per share. There might be a list of sell orders starting at $1.01 per share and going up from there. If a new buy order is placed at $1.01, the volume of shares in those two now matching buy and sell orders will be immediately transacted. If positive news comes in for the company, that would cause Relevant Investors to reassess their risk-weighted valuations for the company, meaning that the buy orders and sell orders will increase in price until the trading price (cross-over price) starts to exceed the risk-weighted valuations of some Relevant Investors, causing them to be motivated to dispose of their shares. Thus the trading price will settle at a price which represents the new 'clearing' risk-weighted valuation of Relevant Investors at that time.

The impact that knowledge of the execution of the Termination Agreement would have had (Question 3)

482 Against that conceptual background, Mr Bowers proceeds to answer the third question he was asked, as to whether knowledge of the execution of the Termination Agreement, if it had been generally available, would have been likely to influence Relevant Investors in deciding whether to acquire or dispose of Quintis shares. He disregards, essentially, developments after the

Relevant Period (which in the first instance was defined as being from 16 to 19 December 2016, that is, the period immediately following the execution of the Termination Agreement). He also disregards the 'non-public specifics' of the Galderma Agreements, which were included in his brief. His focus, he says, is on the impact of knowledge of the Termination Agreement on active investors.

483 Mr Bowers assesses that impact against the 'relative significance of the Galderma Contract to Quintis in the eyes of Relevant Investors as at the Relevant Period' (LB1 para 7.4 - the '**Galderma Contract**' is defined to mean the two licensing and two supply agreements between Galderma and Santalis and ViroXis that are defined in this judgment as the Galderma Agreements and in this section the two terms will be treated as synonymous). That significance Mr Bowers takes from study of the market announcements Quintis made mentioning Galderma and Benzac up to that period. His summary of the views that Relevant Investors would have held is as follows (LB1 para 7.4, cross references removed - to be clear, he says that Relevant Investors 'would have held most, and likely all' of these views):

> 7.4.1 The Galderma Contract was effectively a breakthrough, or portal, contract into the key pharmaceutical market segment for Quintis and its [EISO] product.
>
> 7.4.2 The pharmaceutical sector was, over the several years leading up to the Relevant Period, portrayed by Quintis as a key medium and long term growth market segment for its sandalwood product.
>
> 7.4.3 Galderma, and its ultimate parent Nestle, provided high counterparty credibility and brand value - both to Quintis' initiatives in the pharmaceutical sector but also across other sales segments.
>
> 7.4.4 The Galderma Contract was, over several years, portrayed by Quintis as a key long term sales agreement in terms of both volume and price for its EISO product.
>
> 7.4.5 Quintis had directly invested more aggressively in the pharmaceutical sector through its acquisition of [Santalis and ViroXis], establishing vertical integration in pursuit of direct product development, key customer relationships and the attractive additional margins (including licensing fees and royalty streams) on offer.

484 To support this, Mr Bowers then conducts a detailed examination of Quintis's market announcements touching on Galderma and Benzac from February 2014 to December 2016. Much of Mr Bowers' examination of the announcements is conducted by reference to reports and comments made by equity research analysts who were following Quintis through this period. Many of those announcements are described in Section V above, and what they

conveyed to the market is considered in Section VII below. So there is no need to go through all of Mr Bowers' analysis here. The following is a summary.

485 That the Galderma Agreements were 'a breakthrough, or portal, contract' into the key pharmaceutical market segment for Quintis and its EISO is established from the announcements describing the global nature of Galderma, the milestone nature of the contract, and the criticality of acne OTC products to Quintis's initial market penetration in the pharmaceutical sector. Mr Bowers describes the Galderma Agreements as providing 'Relevant Investors with genuine proof of concept/merit with respect to Quintis' attempts to create new downstream markets for its EISO product, in particular with the potentially large pharmaceutical end-use market' (LB1 para 7.10) and a 'very public price point for the long term supply of EISO'. Mr Bowers supports this by setting out favourable commentary in analyst reports published by Canaccord, Moelis and Argonaut. He also notes that in the absence of any announcements of other significant pharmaceutical sector supply agreements, Relevant Investors would assume that the Galderma Agreements were the only key supply agreements for EISO in the pharmaceutical sector.

486 Quintis portrayed the pharmaceutical sector as a key long term growth market segment for its EISO. It did so in a number of announcements canvassed in Section V, including those about how the Galderma Agreements opened up 'a new and substantial market for TFS's Indian Sandalwood oil' and were 'the first of many such product opportunities' ([166] above); how Quintis expected 'a suite of future supply agreements with pharmaceutical companies for other dermatology products and skin indications' ([168] above) and how the Galderma Agreements were 'another important milestone in the development of a global market for TFS's pharmaceutical grade EISO in the dermatology sector' ([169] above). Mr Bowers refers to several more announcements which refer to the pharmaceutical market and also to broker reports on Quintis which refer to that market (albeit only glancingly).

487 According to Mr Bowers, having Galderma as the counterparty 'delivered significant credibility' to Quintis since Galderma was (LB1 para 7.21):

> a major player in the pharmaceutical space and by association through the Galderma Contract undoubtedly delivered clear endorsement and brand value to Quintis in the eyes of other parties in that sector. Moreover, as a subsidiary of Nestle it also represented an excellent sales counterparty in the eyes of Relevant Investors in terms of such items as commitment to contractual obligations and credit risk.

It also 'delivered strong credibility to existing and long term EISO demand volume and pricing levels' (LB1 para 7.23). These sentiments are, once again, reflected in selected quotes from broker reports.

488 As for the proposition that the Galderma Agreements were portrayed by Quintis as a key long term sales agreement in terms of both volume and price for its EISO product, Mr Bowers refers to numerous market announcements. He also refers to the expressed views of equity analysts, namely Moelis and Canaccord, which speak of the importance of the Galderma Agreements to Quintis's prospects. Mr Bowers notes, however (LB1 para 7.30):

> While it is certainly the case that Quintis portrayed the Galderma Contract as a key long term sales agreement right up until the Relevant Period, it is important to note that it did not suggest that this supply agreement, or even pharmaceutical sector sales generally, were highly significant to Quintis' revenue and earnings in the short term (neither in its FY16 financial result commentary, nor in its physical sales guidance for FY17).

489 After an analysis of Quintis's published results and forward earnings guidance, which included a projected ten-fold increase in the amount of sandalwood harvested in FYE 2017 compared to FYE 2016, Mr Bowers then reaches the conclusion (LB1 para 7.39):

> What is readily apparent to Relevant Investors from the FY17 sales guidance is that pharmaceutical product sales, including expected sales under the Galderma Contract, likely compose only a modest amount, and potentially a very small proportion, of the dramatically enlarged FY17 forecast total sales volume and Product Sales Revenue. On balance, the likely conclusion of Relevant Investors during the Relevant Period is that the Galderma Contract is not particularly significant in terms of direct contribution to FY17 physical sales, Cash Revenue and Cash EBITDA for Quintis.

490 But a little later, after further discussion of the relatively modest expectations for supply of oil to Galderma as compared to other channels for the sale of sandalwood in FYE 2017, Mr Bowers says (LB1 paras 7.42-7.43, document references removed):

> The reality is that, irrespective of its reduced significance to short term cash revenue and earnings results, the Galderma Contract continued to be a highly significant sales agreement, including in the eyes of Relevant Investors, to the long term pharmaceutical sector vertical opportunity and thus the long term value of the Quintis business (for all the reasons outlined in paragraphs 7.6-7.48).
>
> In particular, the perceived potential ability of the pharmaceutical sector to deliver reliable buying counterparties in the future (at attractive prices) for the many multiple-times escalation in Quintis-owned sandalwood sales volume post FY21 remained a significant driver of underlying Quintis value, notwithstanding the proportionate changes to short term sales and revenue composition over FY16/17 (for the reasons outlined in paragraphs 7.15-7.18).

(The internal paragraph cross references are to the parts of LB1 that have been summarised above.)

491 Finally, in relation to Quintis's vertical integration strategy of direct investment in the pharmaceutical sector, after referring to the strategy having been 'routinely highlighted' by Quintis in its ASX announcements and presentations, and referring again to published analyst reports, Mr Bowers concludes (LB1 para 7.48) that:

> The existence of the Galderma Contract, particularly the identity and nature of the counterparty to it, quite clearly delivered meaningful validation of Quintis' (through Santalis and ViroXis) vertical capability in the sector to Relevant Investors.

492 After that survey of the views held by Relevant Investors, Mr Bowers turns to answering the third question, which he frames in a heading as 'Expected impact on Relevant Investors of knowledge of execution of the Termination Agreement becoming generally available during the Relevant Period'. His view is that knowledge of the Termination Agreement would have been highly significant to the views of Relevant Investors, not necessarily in relation to Quintis's short term earnings, but in relation to its 'long term volume growth and price/margin prospects' (LB1 para 7.50). That knowledge 'would have driven significant downgrades of the perceptions of Relevant Investors' with respect to those prospects (LB1 para 7.51). Mr Bowers gives four reasons for that, as follows (LB1, headings in original):

> 7.51.1 **Loss of a potentially lucrative long term supply agreement and what appears to be the sole significant supply contract held by Quintis [in] the pharmaceutical sector.** As outlined previously, the Galderma Contract was a portal contract into the pharmaceutical sector for Quintis with an industry heavyweight as a counterparty. This termination therefore represents removal of Quintis' breakthrough contract in the pharmaceutical sector, and one that seemingly hadn't been supplemented with any other significant supply agreements in that sector.
>
> 7.51.2 **Loss of the imprimatur and brand value of association with Galderma (and Nestle).** The imprimatur and brand value of the association with Galderma (and Nestle) were critical to the credibility of Quintis' growth plans and product initiatives in the pharmaceutical space generally. It was also a significant factor more generally in the sale of sandalwood plantation investments. The extent to which Quintis marketed this association (by name), and right up until the Relevant Period, is also likely to significantly diminish the credibility of Quintis' senior management in the eyes of Relevant Investors generally.
>
> 7.51.3 **Reduced confidence in the long term demand outlook for, and Quintis' pricing power in, the sandalwood products market generally.** Most of Quintis' underlying value is tied up in much larger, longer term harvests of growing sandalwood - negatively altered perceptions around the long term demand and pricing outlook for sandalwood products are thus highly

significant to Relevant Investors' underlying valuation of Quintis. Put differently, given the many multiple times escalation in expected Quintis-owned sandalwood sales volume post FY21, the expected sandalwood sales volumes and price capable of capture by Quintis in the long term was critical to the entire Quintis value proposition for Relevant Investors. The size of the potential pharmaceutical market and the quality of the counterparties on offer there (domicile, legal status, credit worthiness) clearly also assisted Quintis in the sale of its core plantation investment products by driving belief and credibility in long term sandalwood product demand volumes and price levels.

7.51.4 **Reduced confidence in the magnitude of the sandalwood pharmaceutical opportunity and the ability of Quintis' vertical strategy to capture that opportunity.** While Galderma was not the only potential large counterparty available to Quintis in the pharmaceutical space, in the eyes of Relevant Investors there is a reduced chance of other groups signing up with Quintis if a market leader has decided EISO isn't the optimal ingredient, or not sufficiently marketable, for a specific or various use(s).

493 After giving those four reasons for significant downgrades of the Relevant Investors' perceptions of Quintis's prospects, Mr Bowers goes on to express his opinion in the manner that has given rise to the objection currently under consideration (emphasis in original):

7.52 The significantly downgraded views of Relevant Investors on Quintis' long term growth and margin prospects translate directly into, for example, a lowering of the Price/Earnings multiple they are willing to apply to Quintis' existing earnings base, or a lowering of the rate of volume and/or margin growth they are willing to embed in their discounted cashflow (DCF) forecasts for Quintis.

7.53 As a direct result of this impact, and in-line with the framework outlined in my response to Question 2, many Relevant Investors would have been likely to lower significantly their estimates of current risk-weighted value for Quintis. Considering all the established context, and applying my experience and expertise to that context, the average magnitude of this reduction would have likely been *at least* 10%, and probably considerably more, in my opinion. As outlined in my response to Question 2, and directly above, this process might be undertaken by Relevant Investors in a number of different ways (in part, dependent on the valuation framework(s) being utilised by each). However, the net effect is the same - a substantially lower risk-weighted valuation for Quintis (and Quintis Securities) across many Relevant Investors.

494 I will proceed to summarise the rest of Mr Bowers' reports before determining the objection to the admissibility of the reports which is based, in particular, on the second of these paragraphs. Whether or not the balance of the reports bears on the objection, it is better not to break that summary into two.

495 Mr Bowers proceeds to refer to an analyst note by UBS dated 29 August 2016 which sets out a 'downside scenario' which (according to the note) 'could occur if pharmaceutical products

failed to launch or gain traction with end users'. Mr Bowers refers to this as the analyst expressing the view that (in Mr Bowers' words) 'there is still very considerable downside risk to Quintis' valuation (and the prevailing Quintis share price) from the long term pharmaceutical strategy effectiveness being called into serious question' (LB1 para 7.56).

496 Mr Bowers' conclusion on question 3 is as follows:

> 7.57 For many Relevant Investors the reduction in their risk-weighted valuation of Quintis Securities as a result of knowledge of the execution of the Termination Agreement would likely have seen this valuation fall to a level significantly below the prevailing Quintis Securities price during the Relevant Period, or interval(s) thereof (as per the dynamics outlined in paragraphs 6.35-6.41 and 7.53-7.56). In other words, the impact of knowledge of execution of the Termination Agreement would have caused many Relevant Investors to see Quintis Securities as materially overvalued.
>
> 7.58 As such, many of these Relevant Investors would have been likely to be influenced to not acquire Quintis Securities post the execution of the Termination Agreement becoming generally available information; or if they were already holders of Quintis Securities, many influenced to dispose of part or all of their holding in Quintis Securities (as per paragraphs 6.28-6.29).
>
> 7.59 In the same vein, and as explained in paragraphs 6.12-6.14, many newsflow traders and other analogous Relevant Investors were similarly likely to be influenced to not acquire Quintis Securities post the execution of the Termination Agreement becoming generally available information, or if they were already holders of Quintis Securities, many influenced to dispose of part or all of their holding in Quintis Securities.
>
> 7.60 For the above reasons, during the Relevant Period knowledge of the execution of the Termination Agreement would have been likely, if that information had been generally available, to influence Relevant Investors in deciding whether to acquire or dispose of Quintis Securities.

The impact that knowledge of the execution and terms of the Termination Agreement would have had (Question 4)

497 The difference between question 3 and question 4 put to Mr Bowers is that the former asks him about the impact on investor behaviour if knowledge of the execution of the Termination Agreement had been generally available in mid-December 2016, while the latter adds the hypothesis that the terms of that agreement were also generally known.

498 Mr Bowers considers that the only matter that Relevant Investors are unlikely to have foreseen without knowledge of the terms of the Termination Agreement is the inclusion of the option given to Galderma to reinstate the Galderma Agreements by 1 July 2017. But he does not consider that knowledge of the option would be likely to meaningfully alter the impact of knowledge of the execution of the Termination Agreement on Relevant Investors. That is

because the duration of the option is limited and investors are likely to have considered that if there were any significant likelihood of Galderma exercising it, there would have been little commercial rationale for Galderma to have executed the Termination Agreement in the first place. So Mr Bowers does not consider that knowledge of the terms of the Termination Agreement, beyond knowledge of the fact of execution of that agreement, would have been likely to have influenced Relevant Investors to acquire or dispose of Quintis securities, had that information been generally available.

The impact on Relevant Investors of knowledge of the things that Quintis did disclose on 6 June 2017 (Question 5)

499 Question 5 posits that, in addition to knowledge of the execution and terms of the Termination Agreement becoming generally available during the Relevant Period (mid-December 2016), the further matters that Quintis did actually disclose on 6 June 2017 were also disclosed at that earlier time. The excerpt from the announcement which appears in the question put to Mr Bowers is at [440] above. It is essentially comprised of four propositions:

(a) all supplies of EISO under the Galderma Agreements took place in the 2014 and 2015 calendar years - in other words no oil had been supplied under the agreements in 2016;

(b) in those earlier calendar years, those sales of EISO contributed only 1.5% and 2.5% respectively of Quintis's total sales revenue;

(c) Quintis supplies wood and oil to a variety of buyers and the volumes and monetary value of sales to Galderma were not 'in themselves' material; and

(d) Galderma had no minimum purchase obligation under the Galderma Agreements.

500 On the face of things, each of these was capable of reducing the importance of the Galderma Agreements in the eyes of Relevant Investors. But Mr Bowers' view is that they would not have had that effect. That is because, in his opinion, Relevant Investors perceived the Galderma Agreements as highly significant to the long term value of Quintis's business due to the perception that the agreements confirmed the ability of the pharmaceutical sector to deliver reliable buying counterparties at attractive prices for the significantly increased volume of sandalwood sales from Quintis-owned plantations post FYE 21. The fact that in the calendar years 2014 and 2015 (and 2016) the Galderma Agreements were financially immaterial to Quintis would not have changed those longer term expectations. Hence the knowledge of the execution of the Termination Agreement would have had the same material impact on Relevant Investors, even if Quintis had disclosed those additional matters at the same time.

Whether Mr Bowers' opinion would change if the Relevant Period were extended to 27 March 2017 (Question 6)

501 In LB2, Mr Bowers answered a supplementary question ASIC asked him, as to whether his opinions would be any different to those expressed in LB1 (questions 1-5) if the Relevant Period were 16 December 2016 to 27 March 2017, rather than 16 December 2016 to 19 December 2016. In other words, Mr Bowers is asked for his opinion of the impact on Relevant Investors of disclosure of the execution (and execution and terms) of the Termination Agreement at any time up to and including the trading halt that the ASX imposed at Quintis's request on the morning of the 27 March Response.

502 Mr Bowers does not consider that the additional market releases that Quintis made between 19 December 2016 and 27 March 2017 would have made any difference to his views. The messages in those later announcements were a continuation of the messages contained in the announcements made in the period leading up to 16 December 2016, which were the foundation of Mr Bowers' view that Relevant Investors were likely to have viewed the Galderma Agreements as significant to Quintis's long term prospects. Nothing was disclosed in the period 19 December 2016 to 27 March 2017 which would have led investors to significantly change their views about the significance of the Galderma Agreements.

503 Mr Bowers takes the Glaucus Report into account. He acknowledges that it was a strident critique of Quintis's business model and practices. But it was written by a self-described short-seller with a disclosed financial interest in a decline in the market price of Quintis shares. It relied substantially on information that was already publicly available, albeit assembled and analysed in detail in the Glaucus Report. And it contained minimal commentary about the Galderma Agreements.

504 Mr Bowers considers that the 7.4% decline in the price of Quintis shares on 22 March 2017 (the date of release of the Glaucus Report) and the 13.4% decline the following day are 'highly likely to be attributable to a cause(s) well outside normal market fluctuation', and he notes that from close of trade on 21 March to close of trade on 24 March 2017, the price declined by approximately 22%. In Mr Bowers' view, the Glaucus Report 'clearly induced many Relevant Investors to meaningfully lower their estimates of current risk-weighted value for Quintis' (LB2 para 1.10). Even so, this does not meant that Relevant Investors accepted everything in the Glaucus Report - if they had, the price would have gone down closer to zero. So Relevant Investors were still acting on risk-weighted valuations. And whatever additional risk they had

factored in due to the Glaucus Report, it was not risk arising out of or bearing on the Galderma Agreements, because they were hardly mentioned in the report.

505 Accordingly, even though the Quintis share price had gone down since December 2016, in part because of the Glaucus Report, the proportionate impact on that price of knowledge of the execution and terms of the Termination Agreement would have been likely to have been the same. So Mr Bowers' answers to questions 1 to 5 would have been the same, even if the Relevant Period had been extended to 27 March 2017.

Mr Bowers' opinions are based on his expert knowledge

506 The essence of Mr Wilson's objection to all this, relying on *Makita*, is that it does not furnish the court with criteria to enable an evaluation of the validity of Mr Bowers' conclusions. This is said to be, critically, because 'Mr Bowers does not provide any reasoning in support of his opinion as to the magnitude of the change in Relevant Investors' risk-weighted valuations' (closing submissions para 524, emphasis in original). This is premised on the following summary of Mr Bowers' opinion at paragraphs 522-523 of Mr Wilson's written closing submissions:

> So, in short, Mr Bowers' opinion is that if Relevant Investors became aware of the termination of the Galderma Agreements during the Relevant Period, they would have lowered their risk-weighted valuation of Quintis by at least 10% and probably considerably more.
>
> This difference would, in his opinion, influence Relevant Investors not to acquire or to dispose of Quintis shares: see [7.60] of Exhibit 1001. As noted above, the basis for the conclusion that a 10% change in Relevant Investors' risk weighted valuation would influence them not to acquire or to dispose of Quintis shares is unstated.

507 There is some force in the objection because of the way in which Mr Bowers expresses himself in the key paragraph of LB1 (para 7.53). But in the end I have decided to overrule it. That is because I consider that, despite the reference in Mr Bowers' reports to a figure of 10%, his opinion is not based on any quantification of the impact that general knowledge of the Termination Agreement would have had on Relevant Investors' valuations. When the passages on which Mr Wilson focusses are understood in their full context, it is clear that Mr Bowers' opinion is that if knowledge of the termination of the Galderma Agreements had become generally available during the Relevant Period, that would have led many Relevant Investors to value Quintis's shares at a level significantly below the prevailing market price, and to see them as materially overvalued, so that those investors would have been influenced to sell or not to acquire Quintis shares. That is an opinion about investor behaviour which does not

require the risk-weighted valuation of any investor, or of investors as a whole, to be calculated and quantified. Once the opinion is understood that way, it becomes apparent that Mr Bowers has explained the conceptual approach which underpins it in detail, and in a way that equips the Court to form its own independent judgment by the application of that approach to the evidence.

508 In short, Mr Bowers' opinion is not quantitative in nature, so he does not need to provide any numerical calculations supporting the figure of 10%. The nub of his opinion at LB1 paragraph 7.53 is that Relevant Investors would have been likely to lower their estimates of current risk-weighted value for Quintis shares and 'the **average magnitude** of this reduction would have likely been *at least* 10%, **and probably considerably more**' (bold emphasis added, italics in original). Despite the use of the figure of 10%, it is clear that Mr Bowers is not purporting to put a value on the average reduction. It would be impossible to do so. That would require assessing the individual risk-weighted valuations of a large number of investors and averaging them out. When that is borne in mind, it is clear that the true content of his opinion is that the average reduction would probably have been considerably more than 10%. That is, it is likely to be a substantial reduction but the precise extent is not able to be given. He himself emphasises that the 10% figure is only a minimum estimate. And the fact that it is an average of the valuations (conscious or otherwise) of many investors means that the numerical valuation process attributed to any single investor would not bear on the ultimate opinion.

509 For similar reasons another criticism that Mr Wilson makes, that Mr Bowers does not explain by how much an investor's risk-weighted valuation would need to differ from the market price in order to influence the investor to acquire or dispose of the securities, is misplaced. It is not an opinion about the thought process of any one investor. It is an opinion about how the market as a whole will behave in view of the risk-weighted valuation approaches of individual investors.

510 This understanding of Mr Bowers' opinion is supported by the fact that it is no part of the issues in this proceeding to quantify the likely impact that knowledge of the Termination Agreement would have had on investors. In the end, in this proceeding Mr Bowers is giving an opinion as to materiality, and in this proceeding that opinion must be relevant to the issue of what the hypothetical reasonable director would have concluded. There is no objection to the opinion

on the basis of relevance. The opinion does not require quantification to make it relevant and so admissible if the two conditions in s 79 are satisfied.

511 That is reflected in the main question Mr Bowers was asked, question 3, which is framed in qualitative terms, as to whether knowledge of the execution of the Termination Agreement would have been likely to have influenced Relevant Investors in deciding whether to acquire or dispose of Quintis securities. It is further reflected in the fact that the analysis he sets out concerns investor assessments of long term prospects, as confirmed and contained in the Galderma Agreements, not the short term readily quantified outcome of the agreements, that is, how much EISO was ordered and sold in 2014, 2015 and 2016. Mr Bowers specifically discounts the relevance of the latter. Consistently with this, Mr Bowers' conclusions at paragraphs 7.57-7.60 are not expressed in quantitative terms at all, but in terms of significant falls in valuations, of material overvalue, and of the likelihood that Relevant Investors would be influenced not to acquire Quintis securities or to dispose of them. Mr Bowers was asked about, and is describing, investor behaviour, not a valuation.

512 Importantly, in Mr Bowers' earlier description of the behaviour of investors in arriving at and acting on risk-weighted valuations, he does not suggest that their valuations would converge on a single value. To the contrary, his evidence is that both the techniques and the inputs used would vary widely from investor to investor, as would the significance and weight put on any given factor, and newsflow investors would not make calculations of that kind at all. And even for investors who do make them, there is obviously no fixed threshold of difference between price and value which would motivate all of those investors to buy or sell, and thus to take part in the process of on market offers which Mr Bowers describes as determining, in the end, fluctuations in the market price. Even where, as I have set out above, Mr Bowers says that the 'same *sort of* impact' (emphasis added) would be expected regardless of the valuation method used, it is clear from the broad nature of the quoted phrase that he is referring to the nature of the impact (positive or negative) and its order of magnitude. He is not saying that valuations of Quintis shares, or quantitative assessments of the impact of new information, would all converge on a given number. He confirmed in his oral evidence that he was describing a class of investors and that within that class there would be variations.

513 Consistently with that, in paragraph 7.53 of LB1, immediately after saying that the average magnitude of the significant reduction in investor estimates of current risk-weighted value for Quintis would have likely been at least 10%, and probably considerably more, Mr Bowers goes

on to say that the process might be undertaken by relevant investors in a number of different ways and describes the 'net effect' of that in qualitative terms: 'a substantially lower risk-weighted valuation for Quintis (and Quintis Securities) across many Relevant Investors'. Mr Wilson is therefore incorrect to submit, as he does, that Mr Bowers says that all valuation methodologies would have produced the same net effect, if that is understood to mean the same quantitative reduction in estimates of value.

514 Understood this way, it is apparent that the basis of Mr Bowers' opinions is given in a way that permits the Court to make its own independent assessment of those opinions and their value: cf. *Makita* at [68]. The basis of the opinions is explained in detail, and has been set out in the summary given above. Based on his long observation of the behaviour of investors in the market, they assign risk-weighted valuations to listed entities, whether consciously or not. Those valuations reflect investors' assessments of the long term prospects of the company. In the case of Quintis, those valuations were likely to have been heavily influenced by the company's announcements and broker analyst commentary on them about the Galderma Agreements as enhancing those long term prospects in themselves, and also pointing to the likelihood that other transactions with pharmaceutical companies would further enhance those prospects. Those valuations were likely to have been revised significantly downwards when it was revealed that the Galderma Agreements had been terminated after less than three years. Four specific reasons for that, based on the evidence, are given (see [492] above).

515 That is the answer to the criticism Mr Wilson gives of Mr Bowers' reasoning that it leaves unexplained 'how his description of what Relevant Investors would do with information - all given in the abstract - informs his opinion as to the actual effect of the termination of the Galderma Agreements on Relevant Investors' risk-weighted valuations, and so the price and value of Quintis shares' (closing submissions para 528). It is, in truth, explained in some detail; just not in quantitative or numerical terms. As I have said, what counts as a proper exposition of the expert's reasoning process will always depend on the nature of the task and of the opinion being expressed. The qualitative evaluation and assessment of the likelihood of a hypothetical past event in which Mr Bowers has engaged is not susceptible of further articulation in the present circumstances, nor is further articulation necessary. At all times, Mr Bowers pins the effect of the announcements that had been made to investors' perceptions of long term prospects, and the reasons why there would be a significant downgrade to those if the Termination Agreement had been announced during the Relevant Period (all expressed qualitatively, not quantitatively). This is capable of being assessed by the Court, which may

decide that the effect would logically not have impacted on those perceptions in that way. A competing expert could do the same and could supply reasons for his or her different view.

516 It is relevant to note that this was the essence of Mr Bowers' own defence of his approach in cross examination. When asked how he got from the reasoning he had undertaken 'to a number of more than 10 per cent', his answer was (ts 461):

> … And the answer to that is utilising that framework and attempting to come up with an estimate of the likely impact, bearing in mind the impact is not as directly quantifiable as the framework outlines; it simply shows the framework or the methodology that people would use - relevant investors would use then, no, it is the core of my expertise and experience which says that would be the likely impact having assessed all the available context.
>
> Okay. You have explained in your report how you do a DCF. Most elegantly so. And also an earnings multiple. I don't think anyone would be surprised to understand what they are. So you've explained all of that. Then you say, well, the effect of the new information being a termination of the Galderma agreement, would have an effect on either of those forms of valuation?---Any form of valuation, in the framework that they're used, yes.

517 And a little later, after being asked how the Court could compare his reasoning to that of a hypothetical different expert who did not think the impact would be 10%, Mr Bowers said (ts 462):

> I have laid that out to the fullest extent that I can in a balanced and objective fashion and in some depth, I think, as you acknowledge with respect to the report, I don't have anything more to add to the concept of how that has been arrived it, with respect.

518 I agree that Mr Bowers does not need to give any more than the ample explanation of his reasoning given, for the most part, in LB1. The second objection to the admissibility of his report is overruled.

VII. RESOLUTION OF THE ISSUES

519 Turning now to resolution of the issues, I will use the numbering at [58] to designate each of them.

(1) What were Mr Wilson's duties and responsibilities as Managing Director of Quintis?

520 To apply s 180 of the *Corporations Act* to the present allegations requires findings as to what office Mr Wilson held, and what his responsibilities were within Quintis: see s 180(b).

521 The offices Mr Wilson held are clear enough and have been described in Section I above. He admits ASIC's pleas that until his resignation on 27 March 2017, he was a director of

Quintis (relevantly, from 12 June 2012), its Managing Director (from at least September 2015) and a director of Santalis (from approximately July 2015).

522 ASIC pleads that Mr Wilson's duties and responsibilities as Managing Director of Quintis included the following (SOC para 8):

> a. selecting matters to be brought to the attention of, and to be addressed by, the Board;
>
> b. informing the Board of matters affecting the company's commercial position, prospects and performance;
>
> c. monitoring and informing the Board of matters affecting Santalis' commercial position, prospects and performance;
>
> d. authorising or approving for publication statements from Quintis to the public;
>
> e. ensuring that any public statements made on behalf of Quintis were not misleading or deceptive or likely to mislead or deceive; and
>
> f. ensuring that Quintis complied with its obligations under the *Corporations Act* and the ASX Listing Rules to ensure that any information notified to the ASX was not misleading or deceptive or likely to mislead or deceive.

523 Mr Wilson does not admit ASIC's pleas as to his duties and responsibilities as Managing Director of Quintis, and contends that there is no evidence of them, or that the evidence does not support them. His written closing submissions referred to the above as 'nothing more than a banal list of directors' duties' (closing submissions para 9). It is not clear where that submission goes, in particular whether it is banal because it is somehow trivial, or it is banal because it is obviously true.

524 In any event, in oral closing submissions, senior counsel for Mr Wilson said that his client accepted the following propositions:

(1) Mr Wilson was the Managing Director of Quintis.

(2) That carried with it duties that were different to those of non-executive directors.

(3) Mr Wilson was also a director of Santalis.

(4) The evidence was that there were regular conversations between Mr Wilson and Dr Castella in relation to the business of Santalis and that was not the case with other directors of Quintis, other than Mr Gooding.

(5) Mr Wilson was in the practice of including things about what was happening with Santalis in his regular board reports.

(6) As a result of these matters, Mr Wilson had a responsibility to tell the Board about significant things concerning Santalis which he had learned in the course of fulfilling those duties, including in the course of communicating with Dr Castella and acting as a member of the board of Santalis. Although, senior counsel's acceptance of this last proposition was put in terms that (ts 796):

> if Mr Wilson was told something of great importance in relation to business for Santalis that it was consistent with his duties as a director of Santalis being appointed by TFS as the parent company but also consistent with his obligations as managing director of TFS to bring those matters to attention of the board at TFS.

525 The difficulty with accepting this concession as the end of the issue is that Mr Wilson qualified his responsibility to tell the Board about matters by reference to matters of 'great importance', and he effectively submits that the termination of the Galderma Agreements did not fall into that category. It therefore remains necessary to consider the evidence as to Mr Wilson's relevant responsibilities which, as explained in Section IV above, concern the functions the officer actually performs.

526 As to direct evidence of Mr Wilson's responsibilities, there was no contract of employment, written job description, board manual or other such formal document in evidence. ASIC did, however, rely on Quintis's annual reports, and there was some evidence on the subject given by former officers of Quintis, including Mr Wilson himself.

527 As to the annual reports, the key events occurred in FYE 2017, so it is convenient to go to Quintis's 2016 Annual Report to see what it said about Mr Wilson's position at the start of the 2017 financial year. The short biography it gave was as follows:

> Mr Wilson is the founding Chairman of the TFS Group having been appointed on 28 March 2000. In December 2006 he was appointed to the role of Executive Chairman, a role which he held until 10 November 2011 when he resigned from the Board. On 12 June 2012 he was re-appointed to the Board in the role of Executive Director followed by the appointment as Executive Chairman on 3 October 2012. The Chairman's role was relinquished on the appointment of a Non-Executive Chairman on 17 September 2013.
>
> He was previously the Managing Partner of the legal firm Wilson & Atkinson, which at the time specialised in taxation, property and commercial law. Mr Wilson is an experienced businessman, who has a long standing involvement in the forestry industry. He is also a governor of the University of Notre Dame.

The 2016 Annual Report also noted that as at 25 August 2016, Mr Wilson had an interest in 12.6% of the company, as well as a number of 'performance rights'.

528 As to the evidence of the witnesses, that has been summarised at [192]-[200] above. That evidence provides ample basis to reach the unsurprising conclusion that as the Managing Director, Mr Wilson had a responsibility to monitor and inform the Board about matters affecting Quintis's commercial position, prospects and performance. Mr Wilson himself accepted as much in cross examination. That acceptance extended, not only to matters concerning Quintis, but to Santalis and ViroXis too.

529 I find that Mr Wilson had all of those responsibilities in his capacity as the Managing Director of Quintis. The finding in respect of Santalis is reinforced by all the evidence set out above showing that Dr Castella directly reported to and communicated through Mr Wilson. I therefore do not accept that it is only in matters of 'great importance' that Mr Wilson was required to bring to the attention of the Board. I am content to adopt the proposition that Mr Wilson himself accepted in cross examination - that if there was some significant or important matter to do with the business of Quintis, Santalis or ViroXis, he would report on it to the Board.

530 The tenor of much of Mr Wilson's submissions about his duties and responsibilities was to the effect that they were shared by other members of the Board and other officers of Quintis. For example, it is said that preparing the board packs was a collective responsibility of Mr Wilson, Mr Stevens, Mr Storm and others in the management team, and that informing the Board of matters affecting Quintis's commercial position was a duty that all directors had. Whether or not that is so, it is not to the point. ASIC is proceeding against Mr Wilson for alleged breach of an obligation of care and diligence in respect of the duties that he had, not against any other person. And it is doing so on the basis that, allegedly, Mr Wilson knew something important which the other directors and officers did not. In those circumstances, the fact that other directors and officers may, in the abstract, have had similar duties to bring important matters to the attention of the Board is irrelevant, at least where no party claims that the other directors and officers knew of the matter said to be important.

531 As to the authorisation and approval of ASX releases, the evidence summarised in Section VI is not entirely consistent, but it is not necessary to resolve the inconsistencies. On any view, Mr Wilson was involved in drafting and approving ASX releases on important matters, as one would expect a Managing Director of a publicly listed company to be. It must have been inherent in that role that he was to take reasonable steps to ensure that the releases were not misleading or deceptive. It must also have been inherent in that role that if he knew of

something important that was required to be disclosed to the ASX, including because a proposed release would otherwise have been misleading, he would take steps to ensure that it was disclosed, so that Quintis would comply with its obligations under the *Corporations Act* and the ASX Listing Rules. I accept that the ultimate responsibility to authorise releases, at least on important matters, rested with the Board, collectively. But, once again, that will not be to the point if Mr Wilson is found to have had knowledge of something important which he did not tell the Board.

(2) What was conveyed by the ASX announcements, financial statements and annual reports?

532 ASIC pleads that by the ASX announcements, annual reports and financial statements between February 2014 and March 2017, Quintis represented to the market that the Galderma Agreements were significant agreements for Quintis and to the long term value of its business.

533 This has been amply made out. The relevant parts of numerous announcements and excerpts from annual reports and financial reports are described above. It is helpful to collect here certain themes which appeared frequently throughout them (I will not provide citation references for the quoted phrases - the reader will find them all in Section V above).

(1) Quintis (or Santalis) had entered into licence and supply agreements with a major global pharmaceutical company with worldwide reach:

(a) 'global pharmaceutical company';

(b) 'world leader in dermatology products with an extensive product portfolio available in 80 countries';

(c) 'worldwide commercialisation';

(d) 'world class pharmaceutical partner' and 'world class-partner';

(e) 'a leading global dermatology company', 'global dermatology leader Galderma', 'TFS's global dermatology partner';

(f) 'wholly owned by Nestle, the world's leading nutrition, health and wellness company';

(g) 'Galderma is a global dermatology company with a worldwide network of distributors, more than 4,500 employees and an extensive product portfolio available in 80 countries';

(h) 'Global launches expected to follow in 2015 (including eczema)', 'global launches set to follow';

(i) 'distribution in more than 80 countries';

(j) a 'global giant';

(k) 'Nestlé owned international dermatology company Galderma'; and

(l) 'A subsidiary of Nestlé, it possesses an extensive product portfolio distributed to 80 countries'.

(2) The Galderma Agreements were of major or strategic significance for Quintis:

(a) 'new strategic partnership';

(b) 'opens up a new and substantial market for TFS's Indian Sandalwood oil';

(c) a 'landmark deal for TFS', 'this landmark deal', 'a landmark deal was finalised with Galderma', 'Landmark supply agreement with Galderma', 'our landmark agreement to supply pharmaceutical grade Indian sandalwood oil to Galderma';

(d) 'a significant milestone for TFS'; and

(e) 'an important first step in realising a number of significant global opportunities'.

(3) The Galderma Agreements were long term:

(a) 'new long term exclusive supply agreement';

(b) 'into the long term', 'over the long-term'; and

(c) 'Long-term supply agreement for TFS pharmaceutical grade oil'.

(4) The amount of oil that was to be sold to Galderma Agreements could be significant:

(a) 'has the potential to consume a significant proportion of TFS's oil output', 'has the potential to consume a large proportion of TFS's oil';

(b) 'this substantial market opportunity';

(c) 'MAJOR SUPPLY DEAL';

(d) 'with Galderma taking all of our oil last year and the vast majority of production in the current year';

(e) 'If TFS and Galderma can tap just a fraction of that market then the demand for TFS's sandalwood oil from the US alone will be enormous';

(f) 'this is a huge potential market for Benzac®, TFS, Santalis and our pharmaceutical grade East Indian Sandalwood oil'; and

(g) 'TFS now has significant and multiyear contracts in place with a number of global companies'.

(5) The Galderma Agreements confirmed that Quintis's EISO was worth US$4,500 per kg:

(a) 'confirms a market price for TFS oil';

(b) 'Long-term supply agreement for TFS pharmaceutical grade oil at a price of US$4,500 per kg';

(c) 'The achievement of a sale price of US$4,500 per kilogram of oil under an exclusive supply agreement with Galderma, gives us great confidence, subject to ongoing consumer uptake, in the company's future profitability and cash flows over the coming decade'; and

(d) 'TFS is supplying pharmaceutical grade oil at a price of US $4500 per kilogram'.

(6) Benzac had been successfully launched in the US (these announcements commenced in November 2014):

(a) 'Galderma will launch its Benzac® Acne Solutions, containing TFS's Indian sandalwood oil';

(b) '[Galderma] is releasing Benzac® through major US retailers nationwide';

(c) 'the Benzac products which were successfully launched by Nestle-owned Galderma earlier this year';

(d) 'Benzac was successfully launched this year into the US market, the largest teen market acne in the world. Awareness of the brand is growing fast and Galderma is supporting it in 2016 with a full marketing plan'; and

(e) 'Significant growth in sales of Benzac®, with royalty receipts tripling in Q2 FY16'.

(7) Galderma was going to use EISO in more than one product:

(a) 'global pharmaceutical company plans to launch a range of dermatology products using TFS's Indian Sandalwood oil in the United States';

(b) 'product launches expected later in 2014'; and

(c) 'We are excited by the prospect of TFS EISO becoming a core ingredient in a suite of over the counter and prescription dermatology products with a strong pipeline of new products being developed'.

(8) Further opportunities were likely to open up:

(a) 'TFS expects these agreements to be the first of many such product opportunities as TFS's Indian Sandalwood oil becomes an increasingly important natural agreement in the rapidly expanding global market for dermatology, which is currently estimated to exceed US$20 billion per annum'; and

(b) 'TFS expects a suite of future supply agreements'.

534 It is worth mentioning, however, that the more full throated mentions of Galderma and Benzac began to drop away from about November 2015. That is, from that time on, they were mentioned mainly in the standard wording appended to Quintis's market announcements, as reproduced at [177], [189] and [264] above. Other specific mentions still occurred, but they tended to mention Galderma in the same breath as naming other customers for EISO which Quintis then had. There were still references to 'the landmark deal with global dermatology company Galderma' as late as October 2016, in the Annual Report for FYE 2016.

535 Mr Wilson submits that since the standard wording did not contain new information about Galderma and Benzac, it must be considered doubtful that investors would have taken much from it. But there was no evidence led to support that suggestion, and the constant repetition of the standard wording is likely to have conveyed to readers that the Galderma Agreements were still on foot and, further, that oil was being supplied under it. It would be reasonable to assume that if the agreement was practically defunct, it would not continue to be mentioned. After all, the standard wording was not restrained; by it, Quintis made repeated mention of its 'supply agreement for pharmaceutical grade oil with Galderma, a leading global dermatology company wholly owned by Nestle'.

536 It is also worth mentioning that nowhere in Quintis's announcements were there any withdrawals or modifications of the matters represented above. Nor, I infer, was the fact that Galderma had declined to take up options to license HPV and eczema products disclosed. Not until July 2017 were the fact that Galderma had taken no EISO from, at the latest, mid-June 2015 (see [203]), nor the absence of binding or non-binding forecasts from Galderma disclosed. By August 2015, Mr Wilson knew that there were doubts about the future of EISO in Benzac. And yet as late as October 2016, the company was referring to the Galderma Agreements publicly and prominently as a 'landmark deal' (see [270] above).

537 True, there had been scattered qualifications to the main message presented above in some of the earlier market announcements. For example, an investor presentation PowerPoint that was

released to the market in January 2014 said 'Supply volumes are dependent on the success of product launches and global consumer take-up'. The original announcement of the Galderma Agreements did refer to Galderma's right to terminate on two years' notice. Mr Wilson relied on these but that reliance is highly selective. They can hardly be understood as providing any significant qualification to the main message when the main message projected such confidence about the likely success of product launches and global take-up. Further, while investors can be taken to have been aware that Galderma could terminate the Galderma Agreements, the issue is whether they were aware that Galderma wanted to do so, or that it had done so.

538 ASIC has made out this element of its case, that Quintis represented to the market that the Galderma Agreements were significant agreements for Quintis and to the long term value of its business.

(3) How important were the Galderma Agreements to Quintis by December 2016?

539 It will be recalled that this issue arises, in part, out of the previous issue. Mr Wilson does not admit the plea of ASIC that I have just found has been made out. ASIC goes on to submit that the market was completely uninformed, and that the reasonable inference arises that the market continued to understand (because it was not told otherwise) that Galderma was both reputationally and financially important to Quintis. Mr Wilson's main substantive response to this is to submit that 'there should be no controversy as to the fact that, by 16 December 2016, the Galderma Agreements were of 'immaterial economic value to Quintis' (closing submissions para 6). He relies on the following matters.

Evidence given by directors of Quintis

540 Mr Wilson relied on evidence that Mr Matthys accepted that, as at April 2017, Benzac was potentially a failing product and was not a substantial source of income for Quintis. But Mr Matthys also gave evidence that the relationship with Galderma was 'not commercially insignificant in the long term' and that while it was 'not particularly relevant for that year's P&L … having a relationship with a large company … with that sort of credibility was, of course, important to the company's standing as a supplier to that industry' (ts 272).

541 Mr Gooding accepted that as at August 2016 sales of Benzac were sluggish, that as at September 2016 Benzac was failing rather than succeeding, and that as at March 2017 the Galderma Agreements 'had virtually no or very limited financial benefit to TFS' (ts 313).

However Mr Gooding then either accepted or put himself (the transcript is unclear which) that the benefit was that there was a relationship with Galderma and with Nestlé.

542 Mr Groppoli accepted that as at July 2016, Benzac was of progressively dwindling significance, and that as at August 2016, the Galderma Agreements were not take or pay and were of limited financial benefit to Quintis.

543 Mr Kay accepted that as at November 2016, Benzac was of limited financial significance to Quintis. But he also accepted that the Galderma relationship remained of strategic value to Santalis in that it provided a way to try to commercialise the Rx program. Mr Kay considered that relationship demonstrated that there was a 'wider use of the oil than, perhaps, the market fully appreciated' (ts 394). He confirmed his agreement with the announcement that Quintis made on 6 June 2017, that the information about the termination of the Galderma Agreements was not 'materially price sensitive' but should have been announced given the history of prior announcements about those agreements. However he gave that confirmation just after giving the following evidence about the process of approving that announcement (ts 397-398):

> It's important that - you know, there was a lot of disagreement about this and it was eventually resolved over a period of time with the benefit of advisers. So it is one of the wicked problems that sometimes boards need to deal with but I think there was general agreement and, certainly, it was my view that this was qualitatively material, this piece of information, because - and I think it says it elsewhere in this document, the Galderma contract had been held out as an indicator that there was an end market and a diverse end market for the Indian sandalwood oil. So, that having been done, there was certainly agreement, maybe not on the qualitative [sic quantitative] side, but certainly on the qualitative side that if we knew then we would have announced.

544 It was not directly put to Ms Franklin that Benzac was of limited significance to Quintis in the second half of calendar year 2016. When it was put to her that she must have known there was a possibility that a decision may be made by Galderma to cease Benzac, Ms Franklin responded by saying (ts 378):

> I've been in the skin care and cosmetic industry for more than 30 years and I know that there are times when a brand is not performing and you need to re-evaluate and take action. It could be modifying the percentage ingredients, it could be taking a lower margin, it could be investing in more marketing. There are many opportunities. And there were discussions ongoing between Santalis and Galderma to review those options. And what we also had was a commitment, at the time, from Galderma to put a TFS logo on their packaging which occurred in, from memory, September 2016. So I think it was reasonable to think that there were sincere opportunities being explored for the long-term relationship between Galderma and TFS.

545 In any event, despite the various answers that the Quintis directors gave to carefully confined questions asked in cross examination, the evidence in their affidavits was that the agreements were significant for Quintis. Mr Matthys stated that, in his mind, 'the execution of the Galderma Agreements was a significant milestone for Quintis because it was the first occasion Quintis had established a relationship with a widely known pharmaceutical company' (JM1 para 22). Mr Gooding also understood them to be significant contracts for Quintis. Mr Groppoli 'considered that the Galderma Agreements gave legitimacy to the Quintis EISO product' because of the relationship with Nestlé. Ms Franklin viewed the Galderma Agreements 'as something that would potentially generate a significant amount of revenue and prospects for the company' and that because of the connection with Nestlé, 'the opportunity for Quintis was significant, particularly if Quintis was able to secure contracts for the supply of EISO for other brands or products within the Nestlé portfolio' (GF para 26).

Mr Bowers' evidence

546 Mr Wilson points out that in his main report, Mr Bowers said that Quintis did not suggest to the market that the Galderma Agreements, or even pharmaceutical sector sales generally, were highly significant to its revenue and earnings in the short term. He reached the conclusion that it was readily apparent from Quintis's FYE 2017 sales guidance that pharmaceutical product sales, including expected sales under the Galderma Agreements, were modest (see [489] above).

547 Mr Bowers also said that disclosure of the fact that Galderma had not purchased any EISO from Quintis since calendar year 2015 was unlikely to be particularly significant to investors because it would have done little more than affirm and strengthen the expectation that in the short term the Galderma Contract was unlikely to be particularly significant in terms of its proportionate revenue and earnings contribution to Quintis.

548 However it is important to appreciate the context of that comment: the point Mr Bowers was making was that Relevant Investors were likely to have viewed the agreements as significant to Quintis's long term prospects, so that the fact that the revenue was immaterial in the short term would not have changed their reaction to the news that the agreements had been terminated. Given the commercial context of all this, in the end that long term significance could only be 'economic' significance, so Mr Bowers' evidence does not support Mr Wilson's submission on this point.

Quintis's Offering Memorandum for Senior Secured Notes released in July 2016

549 This showed sales of EISO of only AU$0.8 million for the nine months ended 31 March 2016.

The Galderma Agreements were important to Quintis

550 Mr Wilson relies on the above matters to make a qualified response to the submission of ASIC that the market was completely uninformed which I have recorded above. The response is that it cannot be made out 'insofar as it suggests that the market continued to assume Galderma was financially important to Quintis' (closing submissions para 8). If financial importance is measured by historical revenue or near term revenue projections, that may be correct. But if that is indeed what Mr Wilson means here, then it is not in truth responsive to ASIC's submission, which goes much further than such short term figures. When ASIC says that the market assumed that the Galderma Agreements were 'both reputationally and financially important to Quintis', it is referring to the market's views about long term financial prospects as well as the many less quantifiable benefits which, on the face of Quintis's many announcements, were promised by the Galderma Agreements.

551 In that regard, Mr Bowers' report makes abundantly clear that the likely view of many investors in the market was that the Galderma Agreements were significant, not to short term revenue, but to the long term prospects of Quintis. The understanding of the importance of the agreements which many investors in the market are likely to have held is set out at [483] above. Mr Bowers sets out his reasons for considering that investors held that understanding in detail. They are summarised in Section VI above and need not be repeated. In my assessment, Mr Bowers' reasoning is logical and it is supported both by the terms of the very many Quintis announcements described above, and by common sense. The market had been told again and again how important a breakthrough the Galderma Agreements were for Quintis, what a good sign it was for the company that it had attracted a counterparty in the pharmaceutical industry of the calibre of Galderma, and how exciting the prospects for growth in the dermatology sector were. To the extent that by the end of 2016 this was no longer so, nothing Quintis had announced dispelled those beliefs or expectations.

552 Mr Wilson's apparent position now, that the Galderma Agreements were not material because they never earned significant revenue, avoids the key point. The key point is that many investors in the market *thought* that significant revenue would be earned *in the future* under the Galderma Agreements, and potentially from the supply of EISO to other pharmaceutical companies, because that is what Quintis's announcements led them to believe. That was 'the

cumulative contextual image that was being presented to the market': *GetSwift* at [1262]. The termination of the Galderma Agreements without any significant replacement in the pharmaceutical sector dashed expectations of such revenue from Galderma, and must have at least severely dented hopes of significant revenue from comparable sources. It is likely that, as Mr Bowers opines, news of the termination would have led many investors to revise downwards their expectations of Quintis's long term revenue, and its ability to dispose of the larger sandalwood harvests projected for future years.

553 For that reason, Mr Wilson's reliance on Quintis's announcement to the market of 6 June 2017, described at [407] above, is also misplaced. While the company's own views on the materiality of information are not irrelevant, they may carry little weight: *Earglow* at [84(e)] (Beach J). That must be all the more so when those views are expressed well after the time at which disclosure of the information should have occurred, if it were material, and in circumstances where the company is defending its previous non-disclosure after queries from the market operator. Whatever the directors of Quintis and their advisers thought at the time was expedient to say to the ASX in answer to its queries prompted by the disclosure of the Termination Agreement on 9 May 2017, they too were missing that key point.

554 It follows from the many announcements made by Quintis that by December 2016, the Galderma Agreements were indeed important to Quintis. They may no longer have been important because of internal expectations about the revenue that was to be earned under them, but they were important to market perceptions of the company and its prospects. This finding, as broadly as it is expressed, is important context for consideration of what the hypothetical reasonable director would have done during the period just mentioned. That is the place it takes in ASIC's pleaded case. The (now established) fact that Quintis represented to the market that the Galderma Agreements were significant agreements for Quintis and the long term value of its business is pleaded to bear upon what that director would have done in the various pleaded circumstances if he had the knowledge Mr Wilson is alleged to have had. To key issues about the content of Mr Wilson's knowledge I now turn.

(4) Did Mr Wilson know by July 2016 that there was a real possibility that Galderma would seek to end the Galderma Agreements?

555 This issue arises on ASIC's alternative case against Mr Wilson, that is, the case that, even if he did not know in December 2016 that Galderma wanted and was taking steps to terminate the Galderma Agreements, or even if he did not know by February 2017 that the Termination

Agreement had been executed, he nevertheless breached his duties of care and diligence in authorising the 27 March Response without first taking steps to inform himself as to whether the Galderma Agreements remained on foot.

556 This alleged breach is centred on ASIC's plea that the hypothetical reasonable director with certain pleaded knowledge would have taken those steps to inform himself. The knowledge is that pleaded at paragraphs 14 to 14C of the SOC. It includes: the (uncontroversial) fact of the many mentions of Galderma and Benzac in ASX announcements, annual reports and financial statements (SOC paras 14, 14A); also knowledge of the proposition I have just found to have been made out, that Quintis thereby represented to the market that the Galderma Agreements were significant for Quintis and the long-term value of its business (para 14B); and also the proposition I am addressing here, that by no later than July 2016, Mr Wilson knew that there was a real possibility that Galderma would seek to end the Galderma Agreements (para 14C). Mr Wilson denies this although, importantly, his defence does acknowledge that by July 2016 he understood that there was a possibility that Galderma would seek to end the distribution of Benzac.

557 ASIC particularises its plea that Mr Wilson knew there was a real possibility that Galderma would seek to end the Galderma Agreements by saying that it is to be inferred from seven documents - email chains and Board reports - which have been described above. They are as follows:

(1) The email chain between Mr Wilson and Dr Castella regarding Galderma on 18 July 2016 described at [258] above, in which Mr Wilson said 'keep very close to them as we cannot afford to get blindsided by a sudden departure' and, 'It's a race against time here because as soon as we can get another OTC launched the less we are concerned what they do, and in fact we can then drive the agenda with them more aggressively ourselves' (Exh 449).

(2) Mr Wilson's report to the Board dated 22 July 2016, the relevant excerpt from which is at [259] above. This shows that Mr Wilson was aware of the possibility that, following Nestlé's acquisition of Proactiv, Galderma's attitude or approach to Benzac might change adversely. However the reference to 'which direction Galderma will take' is too vague to permit anything more than that to be drawn from the report.

(3) The email chain between Mr Wilson and Dr Castella regarding Galderma on 10 August 2016, which is described at [260] above. This shows that Mr Wilson was concerned

about the possibility of 'bad surprises' concerning Galderma and Benzac over the next couple of months although, again, what the nature of those surprises might be is not clear from the email.

(4) The email chain between Mr Wilson and Dr Castella regarding Galderma, which ends with an email dated 22 August 2016 and is set out at [261] above. This shows that Mr Wilson was concerned about 'bad news' concerning Galderma (again, a vague reference) and was also anxious to know whether Galderma were still trying to sell Benzac.

(5) An email from Mr Wilson to Dr Castella regarding Galderma on 31 August 2016, which is set out at [263] above. This shows that Mr Wilson was thinking about ways to 'buy time' against some adverse development concerning Galderma, although buy time against what is not clear.

(6) Mr Wilson's report to the Board dated 20 September 2016, the relevant excerpt from which is at [265] above. This says in terms that Galderma has not made any decision on its commitment to Benzac but its interest in Benzac appears to have diminished after its acquisition of Proactiv, described as both a threat and an opportunity for Quintis. In describing the acquisition as a threat, Mr Wilson can be taken to have known that there was a real possibility that Galderma would discontinue Benzac and so terminate the Galderma Agreements.

(7) The email chain between Mr Wilson and Dr Castella on 27 September 2016 described above at [269] where Dr Castella sent photographs of Benzac packaging with the TFS logo on it and Mr Wilson replied 'Well best evidence we are still alive'. This again shows concern on his part about a major adverse development concerning Benzac, which is likely to have included the discontinuance of the product. It is not clear whether it encompassed the termination of the Galderma Agreements.

558 In opening, ASIC added two further matters to these particulars: Mr Wilson's email of 13 May 2016 to Dr Castella which spoke of a possible need to 'replace' Galderma ([255] above) and Nestlé's acquisition of Proactiv in April 2016. Mr Wilson did not object to ASIC's reliance on these matters.

559 It is worth making two points about how this is pleaded. First, while most of these particulars postdate July 2016, Mr Wilson did not complain they were inconsistent with the plea of material fact, that he knew of the real possibility of termination by no later than that month.

Second, and importantly, it is no part of ASIC's pleaded knowledge for its alternative case that in December 2016 Dr Castella told Mr Wilson that Galderma wanted to and was taking steps to terminate the Galderma Agreements. That knowledge is only pleaded in connection with other breaches. There was no dispute between the parties about that. Mr Wilson's closing submissions put in clear terms that the alternative case was not that Mr Wilson should have made enquiries because of what he was told in December 2016 by Dr Castella. Senior counsel for ASIC did not cavil with that in his oral closing submissions, and embraced the proposition that the alternative case did not rely on Dr Castella's evidence of the December conversations.

560 Nevertheless, a pleading dispute did arise (at the very end of the trial) because in written and oral closing submissions, ASIC submitted that the Court could take into account Mr Wilson's *own evidence* of what Dr Castella told him in December, that Galderma was 'piling on the pressure to discontinue Benzac'. Senior counsel for Mr Wilson took issue with that. He submitted that the case Mr Wilson met at trial was relevantly confined to the knowledge pleaded and particularised at paragraph 14C of the SOC, and the two other matters mentioned in opening. It was not based on anything said to have occurred in December 2016. While it is true that ASIC did not have notice of Mr Wilson's evidence when it added the alternative case a few weeks before the start of the trial, it received his affidavit in the middle of the trial and had made no application to amend. I note in that regard that the affidavit was filed just over one month before closing submissions. Senior counsel for Mr Wilson submitted that if an application to amend had been made, Mr Wilson might have led further evidence, although he did not suggest what that evidence might have been. He submitted that Mr Wilson had taken great care to run the case on the basis of the pleadings.

561 In reply to this, senior counsel for ASIC pointed to the fact that the relevant plea of knowledge, in paragraph 30 of the SOC, was that the hypothetical reasonable director 'had the same responsibilities and knowledge as Mr Wilson (including the matters pleaded in paragraphs 14, 14A, 14B, 14C above)'. The inclusive nature of that plea meant that Mr Wilson's evidence of what Dr Castella said in December 2016 was not outside the plea, and since Mr Wilson was thoroughly cross examined on that evidence, there was no unfairness to him. But, senior counsel said, if that evidence was outside paragraph 30 of the SOC, ASIC was not going to seek an amendment at that point.

562 In my view, Mr Wilson's evidence about what he was told in December 2016 is outside the pleaded case. Despite the use of the word 'including' in paragraph 30 (and in similar pleas of

knowledge in relation to other breaches) it is clear from the context, the careful particularisation of the knowledge alleged, and the way in which the parties ran their cases, that all the knowledge on which ASIC intended to rely was specified in paragraph 30 of the SOC. ASIC did not, for example, seek to enlist the knowledge pleaded at paragraph 16 (that Galderma wanted and were taking steps to terminate the Galderma Agreements) despite the use of the word 'including' in paragraph 30. Also, those representing Mr Wilson made it abundantly clear throughout their conduct of the trial that they would hold ASIC strictly to the pleadings. If ASIC did wish to rely on Mr Wilson's evidence for the purpose of the alternative case, it should have applied to amend after receiving his affidavit.

563 It is true that it is difficult to see what unfairness there could be to Mr Wilson in relying on his own evidence and it is true that his senior counsel gave no example of what further evidence he might have sought to lead. But it would be unsafe to rely on these matters in circumstances where ASIC has chosen not to make an amendment application in which questions of prejudice and further evidence could be fully ventilated. This was a case where the parties did take a strict approach to the pleadings and, in my view, Mr Wilson's evidence about the conversation of December 2016 is outside the alternative case as pleaded.

564 In any event, as explained under Issue (5) below, I have not accepted Mr Wilson's evidence about the conversation. Given that ASIC accepts that the alternative case cannot be based on a material fact which (as will also be explained) I *have* found to be established - that Dr Castella told Mr Wilson that Galderma wanted and were taking steps to terminate - I cannot find in ASIC's favour on the alternative case on an assumption, contrary to my findings, that Dr Castella told Mr Wilson that Galderma was piling on the pressure to discontinue Benzac. The alternative case must be decided on the basis of the knowledge pleaded and particularised at paragraphs 14 to 14C of the SOC, as well as the two additional matters mentioned in ASIC's opening, to which Mr Wilson took no objection.

565 Turning, then, to make findings about Mr Wilson's knowledge: his submissions spent a great deal of time detailing evidence which, he said, showed that the directors of Quintis other than Mr Wilson were also aware of the substance of the information that was the subject of the above documents, and they did not make any inquiries about the termination of the Galderma Agreements before they authorised the issue of the 27 March Response to the ASX. Mr Wilson's written submissions went through the evidence about what each director knew in painstaking detail. But the test is an objective one as to what a hypothetical reasonable person

would have done in Mr Wilson's position. The fact that a number of other people did not make inquiries is not irrelevant to that issue but it does not bear on it directly. There could be any number of individual reasons why each particular director did not make inquiries. As said already, ASIC is not proceeding against the other directors for alleged breach of their duties of care and diligence. The question at this stage is, what did Mr Wilson know?

566 In my view the answer to that question for the purposes of this issue is that, assuming that he did not have the knowledge which Dr Castella is alleged to have imparted to him in December 2016 and February 2017 (see issues (5) and (7) below), Mr Wilson still knew that there was a real possibility that Galderma would seek to terminate the Galderma Agreements. That is so even though many of Mr Wilson's expressions of concern in the documents above are not specific about what might happen. He admits that he understood that there was a possibility that Galderma would seek to end the distribution of Benzac, and he was sufficiently concerned to demonstrate that he knew it was a very real possibility. Mr Wilson must have realised that if that were to occur, the Galderma Agreements would have Galderma paying royalties in return for nothing, and so that there was in turn a real possibility that Galderma would seek to terminate the agreements. This element of ASIC's alternative case has been made out.

(5) Did Mr Wilson know that Galderma wanted to terminate the Galderma Agreements?

567 This issue concerns whether Mr Wilson found out, before the execution of the Termination Agreement, that Galderma had told Santalis that it did want to terminate the Galderma Agreements, and was taking steps to do so. Resolving the issue depends on findings of fact as to what Dr Castella told Mr Wilson about Galderma's intentions in a telephone conversation which occurred on or around 1 December 2016. It is common ground that at least one conversation about Galderma and Benzac occurred at around that time, but the two witnesses have differing accounts of what was said.

Dr Castella's version of the conversation

568 Dr Castella's version of what occurred, as emerges from the evidence described above, was that in a conversation on 1 December 2016, after having received a draft of the Termination Agreement from Galderma, he told Mr Wilson that Galderma wished to terminate the Galderma Agreements at year end, that one of the reasons for that was to avoid ongoing minimum payments and other obligations, and that he explained to Mr Wilson the draft Termination Agreement that he had received. Dr Castella told him that Galderma would not

agree not to terminate, and would not agree to postpone the termination, because it did not want to continue making the minimum royalty payments. They discussed 'mechanisms' that would permit the termination to occur at year end but would give Quintis a longer period before the termination to disclose it to the market. They discussed events that could occur in the time before any announcement which could help with 'the messaging', that is, favourable developments such as new business from other companies or interest from Galderma in Santalis's Rx program (although, later in cross examination Dr Castella said he did not recall Mr Wilson specifying Rx trial results as something that would permit an announcement of the termination of Benzac). They concluded that they would try to get Galderma to agree to an option of the kind that ultimately did find its way into the Termination Agreement.

569 Something else that appeared in Dr Castella's affidavit, but which he did not mention when asked to recall the conversation in the witness box, was that Mr Wilson told Dr Castella not to email him any copies of the Termination Agreement as he did not want drafts being sent back and forth between them. Conversely, that the purpose of delaying termination was to delay a disclosure requirement does not appear in the relevant passages from the affidavits but did appear in Dr Castella's oral evidence.

570 Another detail which only appeared when Dr Castella gave an account of the conversation a third time, in cross examination, was that he and Mr Wilson discussed Galderma's proposal for Santalis to buy back their remaining stocks of EISO.

Mr Wilson's version of the conversation

571 Mr Wilson's evidence, as described above, was that in the key conversation, Dr Castella told him that Galderma was 'piling on the pressure to discontinue Benzac' and take it off the shelf. Mr Wilson asked Dr Castella whether he could get them to defer any decision as to the discontinuance of Benzac for six months until Santalis's Rx trial results are released so that Quintis would have a different negotiating position with Galderma. Dr Castella said that he would go back to Galderma and he thought he could get them to agree to defer the decision in that way. There was no mention of a termination agreement or an option clause, or of termination of the Galderma Agreements, or of a buyback of EISO. According to Mr Wilson he did not tell Dr Castella not to send him drafts of documents, nor did he tell him not to discuss Galderma or the Galderma Agreements or Benzac with anyone at Quintis.

Findings as to the conversation

572 The starting point to deal with these conflicting accounts of the conversation on 1 December 2016 is that it is common ground that, in broad terms, the conversation pertained to the discontinuance of Benzac and occurred soon after the time that Mr McCrea first sent the draft Termination Agreement to Dr Castella. It is possible to state, as common ground between the witnesses at a high level of generality, that the conversation also concerned whether a decision by Galderma pertaining to the discontinuance of Benzac could be deferred for six months so that, hopefully, favourable developments for Quintis or Santalis could intervene.

573 The key difference between the witnesses is whether the discussion did proceed in those broad terms (Mr Wilson's version), or whether there was more specific discussion of the termination of the Galderma Agreements, the introduction of the option, and the desirability of deferring the need to announce the termination of those agreements (Dr Castella's version). There is also a difference between the witnesses as to whether Mr Wilson told Dr Castella not to send drafts to him.

574 That there is at least the common ground described is important. I found both Dr Castella and Mr Wilson to be unsatisfactory witnesses, and am not prepared to accept the truth of any of their evidence unless it supported by objectively established or agreed facts or inferences made from those facts. But on the basis of their agreement that the relevant conversation occurred, I am persuaded that it did occur and that it concerned, at least, the broad subject matter just described. The question then is whether I am persuaded of one or the other of the two competing versions, keeping in mind always that the burden is ultimately on ASIC to establish that its version is more probable than not. While it is logically possible that the conversation did not occur as either witness recalled it, no third version of it emerges from the evidence or the parties' submissions.

575 For reasons elaborated below, I am satisfied that ASIC has established that the conversation did have the minimum content pleaded, namely that Dr Castella did tell Mr Wilson that Galderma wanted to terminate the Galderma Agreements with effect at the end of 2016. I also find that Mr Wilson knew from the conversation that Galderma was taking steps to terminate the Galderma Agreements, in that they had provided a draft of the Termination Agreement to Dr Castella. Mr Wilson also knew by around 7 December 2016 at the latest, that the termination was to be subject to an option to be granted to Galderma permitting it to reinstate the Galderma Agreements at any time on or before 1 July 2017. I find that he wanted the option

to be included so as to give him a basis to defer disclosure to the market. Finally, I also find that he asked Dr Castella not to send him copies or drafts of (what became) the Termination Agreement.

576 In explaining my reasons for these findings, I will commence with the probabilities inherent in the situation, before turning to the plausibility of each witness's accounts of the key conversations, and then to what is revealed by the documentary record and the evidence of other witnesses.

The inherent plausibility of the witnesses' competing versions of events

577 Mr Wilson's version of events is inherently implausible. It requires the Court to believe that Dr Castella embarked on a plan to conceal the termination of the Galderma Agreements from Mr Wilson. That is unlikely. For one thing, the evidence does not establish any reason as to why Dr Castella would want to do that. Mr Wilson sought to advance four reasons.

578 The first was that Dr Castella was concerned that if the Board became aware of the termination of the Galderma Agreements, he might not get a bonus to which he was entitled under his employment agreement. But on 4 November 2016, the Board had already approved that Dr Castella receive a bonus of $125,000, which was 25% of his base annual salary. He was eligible for an annual short term incentive bonus within a range of 0% to 30% of his annual salary, evaluated based on the KPIs found in the merger agreement between Quintis and Santalis. One of the KPIs listed is 'Launch Acne Product line extension #1', a related activity of which is said to be 'Galderma support for pilot mfr, stability, validation'. This is said to be a core activity for '0-2 yrs'. Reports from Santalis that were tendered into evidence showed that Santalis was performing well against the merger KPIs. Dr Castella's evidence was that since the bonus had already been approved he assumed that it would be paid and that he did not link it to the termination of the Galderma Agreements. That is plausible and consistent with the documents just described. The suggestion that Dr Castella would embark on a plan to conceal the termination of the Galderma Agreements from Mr Wilson because of concern about the bonus that had already been approved is pure conjecture.

579 The second reason Mr Wilson postulated as to why Dr Castella would want to conceal the termination from him concerned a margin loan that Dr Castella had. In April 2016 he had borrowed AU$1.1 million secured against approximately 1.3 million shares in Quintis. A margin call could be made if the share price dropped from the price at the outset of the loan, $1.63, by 25% to $1.23. But as at 1 December 2016, the share price was $1.57 and by

16 December 2016, when the Termination Agreement was executed, it was $1.68. It was, then, tracking satisfactorily against the initial price. In those circumstances, Dr Castella's evidence given in cross examination that he did not give it much thought until the events that precipitated Quintis's decline (that is, the Glaucus Report) is plausible and rings true. If it was in his mind that disclosure of the Termination Agreement would precipitate a 25% drop in the share price, that was not explored or otherwise apparent from the evidence. Although senior counsel for Mr Wilson put to Dr Castella that it was 'plainly of great relevance and importance to you that the share price of TFS stayed above $1.23' (ts 144), it was not put squarely to Dr Castella that he was concerned that disclosure of the Termination Agreement would have caused the share price to drop below that level, or more broadly that the margin loan was the cause of his intent to conceal, so it would not be fair to make a finding that it was. This second explanation for Dr Castella's alleged course of concealment is, again, conjectural.

580 The third explanation advanced was that Dr Castella had an interest in Quintis shares and was selling them in February 2017 and so was concerned not to have their price drop. But this too is conjecture. The shares in question were received as consideration for the sale of 50% of Santalis to Quintis and were thus held in escrow for defined periods. The shares were held by a fund which had a charter obligation not to hold securities and so it needed to sell them down as soon as possible, that is, as soon as the escrow period expired. Again, if Dr Castella was concerned that disclosure of the termination of the Galderma Agreements would cause a large drop in the value of the shares, this was not explored in, or apparent from, the evidence.

581 The fourth reason advanced by Mr Wilson in submissions was that Quintis and Santalis were pursuing the possibility of an IPO for Santalis which would probably involve the conversion of 'earn out' arrangements into shares in the IPO vehicle. But this was not put to Dr Castella and any connection between that and a concern about a fall in Quintis's share price resulting from disclosure of the termination of the Galderma Agreements was not even articulated. I do not accept this as a possible reason why Dr Castella would have sought to conceal the true position from Mr Wilson.

582 It is worth interpolating here that if the motivations for deception linked to Quintis's share price were compelling in the case of Dr Castella, they were all the more so in the case of Mr Wilson, who had substantially more shares in Quintis than Dr Castella and a substantially larger margin loan. But it is not necessary to make findings about the reasons for Mr Wilson's concern about

disclosure of the termination; that concern is evident on the face of the emails he sent in May, July, August and September 2016 described at [255]-[269] above.

583 In any event, I do not accept that any of the posited motives for Dr Castella to have concealed the termination from Mr Wilson are sound. Those preparing Mr Wilson's closing submissions seem to have accepted that the evidence as to these motives was not strong, as their primary submission on the point was that it does not matter, that the Court could and should make findings that Dr Castella concealed the truth without making findings about why, and that '[m]ost likely … Dr Castella is simply a person who disregards the truth as and when he chooses' (closing submissions para 318). Be that as it may, the lack of any apparent reason why Dr Castella would want to embark on a course of deception does not enhance the plausibility of Mr Wilson's case.

584 Further, even if, for some unknown reason, Dr Castella did wish to conceal the termination of the Galderma Agreements from Mr Wilson, it is unlikely that Dr Castella would have thought that he had any real hope of succeeding in that. Mr Wilson was keenly interested in the status of those agreements. The existence of agreements to supply EISO to Galderma, a subsidiary of a major multinational company, had featured prominently in Quintis's announcements to the market from February 2014 right up until at least October 2016 (see [270]). That is so even if one disregards the standard wording that appeared at the end of all of Quintis's market announcements from August 2014 to March 2017.

585 Dr Castella knew of Mr Wilson's interest in the status of the Galderma Agreements directly from, at least, Mr Wilson's emails in 2016 just mentioned. The interest expressed in those emails was not limited to the question of whether Benzac was going to be discontinued. It was interest in the relationship as a whole, including its contractual aspects. Mr Wilson's interest in the relationship was informed, to a substantial extent, by concern about whether news of a significant change in the relationship would need to be disclosed to the market, in particular in the absence of 'good news' to counterbalance it. It was not informed solely by a desire to preserve or enhance Quintis's negotiating position with Galderma.

586 These findings are inferences based on the wording of the emails. Mr Wilson's email of 13 May 2016 said it was 'too early to be going negative on Galderma', that is, releasing negative news about the relationship with Galderma, 'as nothing yet in place to replace them', that is, nothing that can be presented as positive news to counterbalance negative news about Galderma. The email was counselling care in 'how we present this' and about the 'line' that

should be presented. Mr Wilson's email of 18 July 2016 was about extending 'the relationship duration', which plainly encompassed the contractual relationship, although it did speak of how the launch of another OTC product would allow Quintis to 'drive the agenda with them more aggressively ourselves'. Mr Wilson's email of 10 August 2016 spoke of not being able to afford 'bad surprises in the next few months until other contracts kick in' which was, again, about market perceptions. His email of 21 August 2016 spoke of being able to 'absorb bad news' and the need to have until the end of the year to 'do this smoothly'. His email of 31 August 2016 spoke of 'buying time' by negotiating on an acquisition of the Benzac brand, and it spoke of this in a way which made it appear that buying time, not acquiring the brand, would be a major purpose of the discussions (as well as using it to 'sow seeds for further RX deals').

587 As well as this level of interest, Mr Wilson had direct relationships with Mr McCrea, Mr Kenney (Director of Acne, Galderma) and Mr Wang (brand director of Benzac). He attended the briefing with Mr Harrison in August 2015 and met him again in October 2015. Mr Wilson accepted that at the time of the draft Discount Letter in November 2015 he was in constant contact with Mr McCrea and Mr Kenney. He had the 'long and cordial call' with Galderma representatives in February 2016. He emailed and spoke to them on other occasions, sometimes with Dr Castella participating or being copied in, sometimes without.

588 Further, the Termination Agreement was known, at least, to Mr Clements, with whom Mr Wilson also communicated directly. There is no suggestion that Mr Clements was somehow involved in any alleged course of concealment. Mr Wilson could easily have discovered the truth about the termination from him.

589 In all that context of Mr Wilson's level of interest, the nature of that interest, the motivations behind it and his direct communications with Galderma personnel and Mr Clements, it is unlikely that Dr Castella could have concealed something as significant as the termination of the Galderma Agreements from Mr Wilson for any length of time, or that Dr Castella thought he would have been able to do so.

590 To the contrary, the behaviour most consistent with Dr Castella's previous conduct would have been to tell Mr Wilson about the termination of the Galderma agreements, or any intention to do so. The clear impression that emerges from the course of correspondence and discussions detailed above is that Mr Wilson and Dr Castella worked together to manage the relationship with Galderma. They both had contact with Galderma staff from time to time, sometimes separately, sometimes together. The text messages described above at [370]-[372] show that

they were on good terms even after Mr Wilson left Quintis and even after the issue about market disclosure of the termination of the Galderma Agreements came to a head.

591 Given the inconclusive nature of the evidence about Mr Wilson's knowledge of the final Discount Letter, there is no basis to think that Dr Castella concealed information about Galderma from Mr Wilson at any time before December 2016, and every reason to think that they shared information in the course of a normal working relationship. No doubt, the fact that Dr Castella and Galderma were both based in Texas meant that he was the point of contact for matters where Mr Wilson was not, but Mr Wilson was by no means reliant on Dr Castella to keep informed about relations and developments with Galderma; he kept abreast of them himself.

592 It follows that the absence of any plausible reason why Dr Castella would have wanted to conceal the termination of the Galderma Agreements from Mr Wilson is material. While the onus was always on ASIC to prove its case, Mr Wilson's inability to point to a motive (in the sense of a goal to be achieved) on Dr Castella's part does not decrease the inherent likelihood that when informed of the impending termination of the Galderma Agreements, Dr Castella did what he had done in the past - he told Mr Wilson about it. For those reasons, it is implausible that Dr Castella sought to conceal the termination from Mr Wilson.

593 In contrast, Dr Castella's version of events is quite plausible. The evidence shows that Quintis, under Mr Wilson's leadership as Managing Director, was concerned to make positive announcements to the market at every opportunity, and many of those positive announcements concerned its contractual relationship with Galderma. Then, as the emails just summarised show, when the relationship began to look shaky, Mr Wilson became concerned, including a high level of concern about what any significant bad news about the relationship would do to market perceptions.

594 There is nothing inherently wrong with any of this. Mr Wilson was the founder and Managing Director of Quintis and he owned a substantial number of its issued shares. It is only natural that he would have been concerned about the possibility that the company might need to announce bad news to the market without, at least, having good news to counterbalance it. He accepted as much in cross examination (ts 599). But that concern makes it entirely plausible that, if he were to be faced with such bad news, he would be concerned to look for ways to delay its release to the market, until it could be offset with good news.

595 And, while Dr Castella could hardly have kept such bad news about Galderma from Mr Wilson, Mr Wilson was much more likely to be able to keep it from the Board and so from the market. No member of the Board had direct dealings with Galderma. Mr Wilson informed the Board about such dealings through his Managing Director's reports in the board packs. It is true that Dr Castella and Mr Clements also prepared reports to the Board on behalf of ViroXis and Santalis, but Mr Wilson had the opportunity to read those reports before the rest of the Board did, and to modify their contents if necessary. The point is not to speculate that this ever did happen in relation to Galderma - there is no evidence that it did. The point is that it is entirely plausible that Mr Wilson both had the ability to control the flow of information about the Galderma Agreements to the Board, and that he knew that he had that ability.

596 The evidence also shows that he had exercised that ability in the past. The clearest example of this is the Managing Director's report of August 2015 (see [208]-[210] above). This was prepared at a time when, on Mr Wilson's own evidence, a senior Galderma executive, Mr Harrison, had told him that unless there was a reduction in the COGS for Benzac as a result of a reduction of the cost or concentration of EISO in the product, the product faced a 'bleak uncertain future'. That was because Benzac was 50% more expensive than its competitors.

597 To be sure, Mr Wilson did not entirely omit this bad news from this report to the Board. But it would have taken an astute reader to have identified it. For it was obscured by talk of 'the huge potential market for us in pharmaceutical and cosmeceutical markets' and the 'wonderful opportunity we have to expand our OTC product range both within and outside Galderma'. A vague mention of the 'potentially enormous' OTC market as cost driven and crowded, particularly in relation to acne, was quickly offset by talk of how 'one breakthrough RX product would be a game changer'. While Galderma's desire to reduce COGS through price or concentration reductions in relation to EISO was mentioned, it was then couched in terms of helping Galderma achieve their 'aggressive growth targets', not in terms of a risk of discontinuance. The meeting being reported on was described as 'very productive' and Mr Wilson was reportedly left with the view that if Quintis adopted a commercial attitude, 'the opportunity to penetrate much further within Galderma was readily available'. After discussion of Galderma's plans to boost marketing of and awareness of EISO, 'some element of price reduction' is mentioned, but it is presented as part of 'tremendous free advertising' by 'an industry leader like Galderma' and as a reasonable trade for 'volume and royalty tradeoffs'. The idea that Benzac was facing a 'bleak uncertain future' without a significant reduction in the price or concentration of EISO used in the product simply does not emerge from the report.

598 In this way Mr Wilson had, and used, the ability to control the flow of information about Galderma and Benzac to the Board. Other examples include his regular reporting of positive news on Benzac to the Board, including the digital marketing campaign for Benzac that was to be launched by Galderma, the new packaging with TFS's logo, and positive sales results. He presented the acquisition of Proactiv by Nestlé as both a 'threat' and an 'opportunity' (see [254] above). He did not report that Galderma had (at least) proposed cutting the price of EISO nearly in half, sought to cancel purchase orders and was seriously considering the future of the relationship with Quintis and Santalis in relation to Benzac. It is plausible that in December 2016, Mr Wilson decided to prevent or delay communication of the termination of the Galderma Agreements to the Board.

599 It could be said against this that it is a serious thing to allege that a Managing Director would make a decision of that kind. There are two answers to that. The first is that it is, equally, a serious thing to allege, as Mr Wilson does, that the CEO of a subsidiary of Quintis would conceal the termination of the Galderma Agreements from the Managing Director of Quintis. This is why I said earlier in this judgment that the conventional perception described in *Neat Holdings*, that members of our society do not ordinarily engage in fraudulent or criminal conduct, does not take one very far in this situation, even if it is conceived of in terms of dishonest or improper rather than fraudulent or criminal conduct. On the parties' respective cases, one or the other of Dr Castella and Mr Wilson has deliberately concealed the termination of the Galderma Agreements from people who were entitled to know it.

600 The other answer is that, on Mr Wilson's own case, by December 2016 the Galderma Agreements were just not that important to Quintis. If that is really what he thought, that makes it more likely that he decided not to communicate their termination to the Board. This exposes a logical tension inherent in Mr Wilson's case: on the one hand, he is saying that the Galderma Agreements were not material; on the other hand he seeks to attack Dr Castella's honesty by pointing to his lack of disclosure of the termination to Mr Gooding, Mr Stevens, Mr Coetzer and the Board.

601 Another logical tension is also apparent in another attack Mr Wilson made on Dr Castella's conduct. He pointed out that Santalis had agreed to terminate the Galderma Agreements as at 31 December 2016 apparently, according to Dr Castella, so that Galderma would not have to make further royalty payments. As Mr Wilson says, that required Santalis's agreement, because the licence agreement between Santalis and Galderma required a two year notice

period for Galderma to terminate, with the annual minimum royalties payable in the meantime. Mr Wilson submits that it is significant that Dr Castella has not explained why Santalis rushed to reach a Termination Agreement which dispensed with that negotiated disincentive to drop Benzac as a product (see Mr Wilson's evidence at [318] above).

602 But Dr Castella was not asked to explain why this was agreed. An explanation emerges from the evidence, however: Dr Castella (at least) believed that Galderma had a genuine interest in Santalis's Rx program, so it would make sense for Santalis to forego the relatively small minimum royalties payable for the calendar years 2017 and 2018 (US$150,000 and US$175,000 respectively) to keep Galderma's good will. The tension in Mr Wilson's submissions arises because they acknowledge this, in that they say that Galderma was showing interest in Santalis's Rx program, and that this is one reason why 'there was a broader negotiation or discussion than just Benzac' (closing submissions para 217).

603 I make no finding that this was why Santalis agreed to dispense with the two year notice period; I do not need to make a finding about why. It is simply that the presence of this possible alternative explanation means that Mr Wilson has not succeeded in impugning Dr Castella's conduct, and perhaps by extension his credibility, on the basis that the agreement to dispense with two years of minimum royalty payments was unexplained.

The plausibility of the witnesses' evidence about the key conversation

604 What has been said so far goes to the probabilities inherent in the situation at the time of the telephone conversation which, it is common ground, took place on about 1 December 2016. As for the conversation itself, once again, Mr Wilson's account of it is implausible but Dr Castella's account of it is not.

605 For one thing, it is unlikely that Mr Wilson would have accepted a statement from Dr Castella that Galderma was 'piling on the pressure to discontinue Benzac' without trying to find out more information about what that meant. Mr Wilson was a lawyer and throughout his evidence he showed a detailed appreciation of the terms of the Galderma Agreements and other relevant agreements, and of the commercial imperatives behind them. He understood that Galderma did not need to pile any pressure on Santalis to discontinue Benzac. He knew that it was Galderma's decision alone. He characterised Galderma as 'commercial bullies', and part of a large multinational corporate group. They had already delivered, in effect, an ultimatum to him at the meeting of August 2015 and in the presentation of September 2015 that if sales did not improve, Benzac would be discontinued. Mr Harrison is likely to have repeated Galderma's

position when he met Mr Wilson in October 2015. Mr Wilson knew that if Galderma wanted to discontinue Benzac, it would do it without Santalis's permission. As I have found, Mr Wilson was keenly interested, not just in whether Benzac was going to be discontinued, but in the status and future of the contractual relationship with Galderma. So if Dr Castella had said something as vague as that Galderma were 'piling on the pressure', it is likely that Mr Wilson would have questioned him further and found out the true position.

606 This exposes another reason why Mr Wilson's version of events is implausible: if Dr Castella truly did wish to conceal the termination of the Galderma Agreements from Mr Wilson, why would he mention the discontinuance at all? It would be more consistent with his supposed plan simply to refrain from talking about Galderma and Benzac, because raising the subject at all invited the prospect that Mr Wilson would find out the true position, whether from Dr Castella or direct from Mr McCrea, Mr Kenney or Mr Harrison.

607 Another reason Mr Wilson's account of the conversation is implausible is that the idea that he wanted to prolong the term of the Galderma agreements so that the release of Rx results would give Quintis a better negotiating position does not make sense. There was no relationship between keeping the OTC product Benzac on the shelves and Quintis's ability to negotiate about Rx products. If Galderma decided to develop an Rx product with Santalis, that would be a separate contract. Mr Wilson accepted as much in cross examination and in any event it is obvious. If the Rx results were favourable, that would give Quintis a good negotiating position. If they were not, then it would not have that position. Delaying the apparently inevitable discontinuance of Benzac for six months would have made no difference to any of that. It is much more likely that the true reason Mr Wilson wanted Galderma to 'kick any decision … down the road', in his words, was to avoid having to disclose it to the market. Mr Wilson accepted in cross examination that what he wanted to do at this point was to buy time to put off any bad news until he had some good news, albeit he said he only accepted it 'in a very, very broad sense' (ts 639).

608 Another reason that Mr Wilson's account of the conversation was implausible was that there was no apparent basis on which Dr Castella could persuade Galderma to keep Benzac on the shelves. Galderma was part of a multinational corporation - 'commercial bullies' - which had made it clear to Quintis that if sales of the product did not improve, it would be discontinued. It can be inferred that by December 2016, Galderma considered that Benzac with EISO was not a success. In that situation, the idea that Mr Wilson, who had engaged in discussions with

Galderma representatives and closely supervised Dr Castella's communications with them, would simply leave it to Dr Castella to see if he could delay discontinuance of Benzac, incurious as to how Dr Castella was going to do that and whether he had achieved it, is difficult to accept.

609 It is similarly difficult to accept Mr Wilson's evidence that he could not remember whether Dr Castella ever told him that he had achieved the objective of kicking the decision 'down the road' for six months, but that he had an understanding that he had (see [321] above). Mr Wilson's level of interest in the issue suggests that he would have found out, one way or another.

610 As to Dr Castella's evidence of the conversation itself, he gave three different accounts of it: one in his first affidavit, a second given in his oral evidence in chief, and a third given in cross examination. The three accounts were not entirely consistent. In particular, the first of these did not mention Mr Wilson saying that he wanted to defer any disclosure requirement, and only mentioned OTC and not Rx as something that Mr Wilson hoped would occur in the six months he was trying to buy. The second did not mention any request from Mr Wilson not to be emailed the Termination Agreement or drafts of it (this was only mentioned in his affidavit which came out in cross examination). In the third account, Dr Castella could not recall Rx being mentioned, and only in that account did he refer to Galderma's buyback of EISO as having been discussed.

611 Certainly these inconsistencies are one reason why Dr Castella's evidence must be approached with caution, and I would not be willing to accept it unless it was supported by corroborating evidence or by the probabilities objectively inherent in the situation. But it is commonplace that people recollect different details of conversations when asked to recount them on different occasions; that fact does not mean that the evidence they have recalled cannot be accepted as true. And the essential contents of Dr Castella's evidence of the conversation are supported by the objective probabilities. Throughout 2016 Mr Wilson had expressed concern about the possibility of Galderma's 'sudden departure' and a wish to extend the duration of the 'relationship' and to 'buy time' until Quintis had something 'in place to replace them' such as 'another OTC launched' so that it could 'absorb bad news'. At the end of 2016, the departure was about to happen, and the relationship was about to come to an end, without anything to replace it. It was consistent with the concerns that Mr Wilson had expressed earlier that he

should seek to delay the need to make any announcement about the termination of the Galderma Agreements.

612 In that context it is quite plausible that Mr Wilson, a trained lawyer, would propose the option. Conversely no good answer to Dr Castella's rhetorical question, 'why on Earth would I want a six-month extension on a document?' emerges from the evidence. If Dr Castella's intention really was to conceal the Termination Agreement from Mr Wilson, there is no intelligible reason why he would have conceived of the option, instructed Santalis's American lawyer to draft it, and then put it to Galderma on the basis that it was about Quintis's disclosure obligations. Dr Castella's conduct makes no sense on Mr Wilson's case, but does make sense on ASIC's.

613 Relatedly, Mr Wilson's reliance on the characteristically vague way in which Dr Castella's evidence put a related point - 'I did attempt to seek a deferral with Galderma which resulted in the creation of the option clause' - is unconvincing. Mr Wilson submits that the phrasing of the answer suggests that Dr Castella agreed with him that he would try to get Galderma to defer making a decision on Benzac, and that Dr Castella then went away and came up with the option clause to effect this. In fact what Dr Castella said in evidence was (emphasis added) 'Again, *I don't know the exact words that went back and forward*, but I did attempt to seek a deferral with Galderma which resulted in the creation of the option clause' (ts 207).

614 Mr Wilson's interpretation of this attributes to Dr Castella a precision with language and care in choice of words that was signally lacking from most of his evidence. It is also selective, in that the general tenor of Dr Castella's evidence was that the idea to propose the option came up in his conversation with Mr Wilson. These submissions do not come close to justifying the strong conclusion Mr Wilson seeks to draw, that the 'only available inference is that Dr Castella concealed the Galderma Termination Agreement from everyone at Quintis, including Mr Wilson' (closing submissions para 252).

Dr Castella's evidence is supported by the documentary record and Mr Matthys's evidence

615 If the above were the only evidence pertaining to the key conversation, ASIC would not have made out its case in relation to this issue. It would not be enough that one witness's account of the conversation was plausible and that the other's was implausible. Plausibility is not the standard, and a mechanical comparison of probabilities is not the correct way to approach the matter. The Court needs to feel an actual persuasion of the relevant events and, given the seriousness of the allegations, the events need to be distinctly proved. Where the credit of both

witnesses is doubtful, the testimony of one or the other will not, by itself, be sufficient to provide such proof. There are, however, several other pieces of evidence which do, in the end, persuade me that the conversation on 1 December 2016 had the minimum content I have outlined above: that Galderma had provided a draft agreement to terminate the Galderma Agreements at the end of 2016, but that Dr Castella would try to secure the insertion of an option permitting Galderma to reinstate within the following six months.

616 *First*, there is Dr Castella's email to Mr Bray on 2 December 2016 asking him to 'rework' the option clause. This happened the day after the likely day of the conversation with Mr Wilson that has been examined above. The inference that is open is that the call with Mr Wilson prompted Dr Castella to draft the option clause to send to Mr Bray for legal advice. That inference is strengthened by the fact that there is no apparent reason why Dr Castella would want to add the option if Mr Wilson had not asked him to do it. No plausible answer to the rhetorical question Dr Castella asked during cross examination - 'Why on earth would I want a six month extension on a document?' (ts 226) - emerges from the evidence. Nor is it plausible that Galderma wanted the option clause: it had quite clearly resolved to terminate the Galderma Agreements by the end of December 2016. The only plausible explanation apparent from all the evidence is that Mr Wilson wanted the option clause to be included in order to give him a basis to defer disclosure of the Termination Agreement.

617 *Second*, there is Dr Castella's email to Mr Bechstein of 2 December 2016 at 3.41 pm (San Antonio time) which said that Quintis was 'ok' with the draft termination agreement subject to the inclusion of the option 'to push our disclosure obligation out'. This provides contemporaneous support for Dr Castella's evidence that in the conversation on 1 December 2016, he and Mr Wilson discussed mechanisms to provide more time before Quintis had to make disclosure, that is, the option. It is unlikely that Dr Castella, the American CEO of an unlisted subsidiary of Quintis based in Texas, would have requested the option in order to defer Quintis's disclosure requirements of his own initiative; it is much more likely that he did so as a result of speaking to Mr Wilson, the Australian based Managing Director of the Australian disclosing entity, Quintis. And the idea that Dr Castella feigned a wish to defer disclosure while at the same time embarking on a plan to conceal the fact of the termination from Mr Wilson entirely would be far-fetched; Mr Wilson did not submit that this occurred.

618 *Third*, there is Dr Castella's email to Mr McCrea of 5 December 2016 at 11.08 am (San Antonio time). This is the one which sent a version of the Termination Agreement with the option

clause included. The email said that the option was necessary 'to avoid triggering an immediate disclosure by TFS' (see [329] above). As with the email to Mr Bechstein, this corroborates Dr Castella's version of events.

619 *Fourth*, there is Dr Castella's email to Mr Wilson of 5 December 2016. It is objectively established from previous email communications that this was sent about an hour after Dr Castella had obtained Galderma's agreement to include the option clause. The email to Mr Wilson asked him to call to discuss Galderma. It said 'I got the language approved and wanted to run it by you first'. It is likely given the previous sequence of events that the 'language' that had been 'approved' was the option clause that had been approved by Galderma. It can in turn be inferred from the way in which Dr Castella expressed the email that Mr Wilson was aware that a draft agreement terminating the Galderma Agreements was in front of Dr Castella, since only then would any discussion of the option make sense. That Dr Castella did not send the draft Termination Agreement or the option clause to Mr Wilson, but asked him in a brief and vague email to call him to discuss Galderma, also corroborates his evidence that Mr Wilson had told him not to send drafts or copies of the Termination Agreement to him.

620 Mr Wilson had no good explanation for the email in either his evidence or his submissions. If this email was not about the Termination Agreement, then what was it about? Mr Wilson has no good answer to that rhetorical question. He did not deny having received the email but he said he had no recollection of having received it or of having telephoned Dr Castella afterwards, but even if that evidence is accepted it can hardly displace the inferences I have described and drawn above. Senior counsel for Mr Wilson submitted that the reference to Galderma could have been about anything and the statement that Dr Castella 'got the language approved' could have been a reference to the general discussion Mr Wilson testified to about 'kicking the can down the road' on Benzac (ts 786). With respect, that is very awkward. It would not be natural to describe a request to Galderma about kicking the can down the road as involving the approval of language. In all the context I have described, including the chronology of emails preceding this one, that reference can only be a reference to the language of a legal document, likely a reference to the option clause that Galderma inserted at Dr Castella's request a mere hour before. I do not accept Mr Wilson's submissions to the contrary.

621 *Fifth*, there are the telephone records showing two conversations between Dr Castella and Mr Wilson which took place about one day after the sending of the email asking Mr Wilson to

call him. The likely inference, which I make, is that they discussed the option in those conversations. They may well have discussed other things, but that is not to the point. Again, it follows from the discussion of the option that Mr Wilson was aware of the effect of the agreement in which it was to be included, namely that it would terminate the Galderma Agreements (subject to the option). This inference supports the account of the conversation that Dr Castella gave, and which I accept, namely that he read the option clause to Mr Wilson and that Mr Wilson approved it.

622 In cross examination, senior counsel for Mr Wilson made much of the asserted implausibility of the proposition that Dr Castella read the option clause to Mr Wilson, but there is nothing implausible about it. While it is somewhat long, it still takes no more than half a page of text and however tedious it may have been, a trained lawyer like Mr Wilson would have been capable of listening attentively throughout.

623 Also implausible, Mr Wilson submitted, was the idea that Dr Castella would draft the option clause, get Mr Bray to settle it, get Galderma to agree to it, and only then get Mr Wilson's approval on it. If Mr Wilson had not approved, Dr Castella would have needed to go back to Galderma to propose further changes. But while that sequence of events is perhaps not usual, it is readily explicable by the fact that Dr Castella was evidently subject to some time pressure from Galderma, and working with them and Mr Bray in a very different time zone to Mr Wilson. It can be inferred that Galderma did not really care about the option clause, which imposed no obligation on it, so proposing further changes was quite feasible.

624 *Sixth*, there is Mr Matthys's unchallenged evidence of the conversation he had with Mr Wilson soon after he (Mr Matthys) learned of the Termination Agreement on 9 May 2017. What is relevant about that evidence is that Mr Wilson told Mr Matthys that he thought that Galderma had intended to make a decision about its relationship with Santalis - not just the continuation of Benzac - and to do so by 1 July 2017. The specific date given by Mr Wilson suggests that he was aware of the specific date that was in fact in the option in the Termination Agreement. It is unlikely that Mr Wilson would have given that date to Mr Matthys had things between him and Dr Castella been left on the vague basis that Mr Wilson had asked whether Dr Castella could 'get them to agree to kick any decision as to what it was going to do with Benzac and about pulling it off the shelves down the road for 6 months', and Mr Wilson had not even followed up to see whether Dr Castella had succeeded in that attempt. Mr Wilson also said in the conversation with Mr Matthys that he did not tell the Board about it because whether or not

the Galderma Agreements continued - not whether or not Benzac continued - was irrelevant to Quintis's earnings and outlook.

625 In connection with this I note a submission by ASIC that the evidence about what Dr Castella told Mr Matthys and others on 9 May 2017 (described at [376]-[381] above) was plausible and consistent with his evidence. Be that as it may, I put little weight on it by itself. Dr Castella then had a reputational incentive to place responsibility for the non-disclosure of the Termination Agreement on Mr Wilson. That is so even if one allows for Dr Castella's evidence that he had been woken by Mr Matthys's first call 'very early in the morning' when there 'was a lot of stuff going on so I don't remember the specifics' (ts 279).

626 Mr Wilson also relies on Mr Matthys's evidence about his conversations with Dr Castella in support of his own case, but I do not consider that it provides such support. Mr Wilson submits that when Mr Matthys first confronted Dr Castella about the termination of the Galderma Agreements, Dr Castella insisted that they had not been terminated and that Galderma had until the end of June 2017 to decide whether to terminate. Mr Wilson submits that this is consistent with his account that Dr Castella made no mention of the termination of the agreements in December 2016. I do not accept that. To say that that the Galderma Agreements had not been terminated is not the same thing as saying that no agreement to terminate them had been entered into. Mr Matthys's evidence does not purport to quote Dr Castella verbatim in a way that would bear the weight Mr Wilson seeks to put on the evidence. In any event, Dr Castella's comment is clearly his own interpretation of the effect of the option that was placed in the Termination Agreement. And it was given to Mr Matthys after Dr Castella had sent him a copy of the Termination Agreement, so it was not an attempt to mislead.

627 *Seventh*, there is Mr Wilson's email to Mr Matthys of 9 May 2017 after Mr Matthys had called him to ask about the termination of the Galderma Agreements. The email says that Dr Castella had told Mr Wilson that Galderma 'had entered into an agreement with santalis that had the [effect] that Galderma would make a decision in July regarding the termination of the contract, or proceeding with it'. Two aspects of this are inconsistent with Mr Wilson's version of events and consistent with Dr Castella's: it speaks of Galderma and Santalis entering into an agreement; and it speaks of the effect of that agreement as leading to a decision about 'termination of the contract'. Also relevant is Mr Wilson's statement in the same email that he did not tell the Board because he thought July was when Galderma was going to make a decision and 'whether we had a contract on foot or not' was not material to Quintis's earnings

or outlook. This is framed in terms of whether the Galderma Agreements were on foot, not in terms of whether Benzac was going to be discontinued or had been discontinued.

628 As I have explained in Section V, Mr Wilson's attempts in cross examination to explain or downplay the obvious meaning of his own statement in the email were unconvincing. He knew as at 9 May 2017 that Galderma and Santalis had entered into an agreement in relation to the termination of the Galderma Agreements. No source of that knowledge is apparent from the evidence, other than the conversations with Dr Castella in December 2016 (and, ASIC alleges, Dr Castella providing a copy of the Termination Agreement to Mr Wilson in February 2017). Indeed, Mr Wilson's own evidence was that he became aware of the things he was saying in point 2 of his email from a conversation with Dr Castella in early December 2016. Since I do not accept Mr Wilson's account of what his email of 9 May 2017 means, it follows that the email provides support, authored by Mr Wilson himself, for Dr Castella's version of the conversation.

629 Mr Wilson submitted that Mr Matthys's evidence about his first conversation with Mr Wilson, to the effect that Mr Wilson did not refer to an agreement but only to Galderma making a decision by 1 July 2017, was significant in this regard. Also significant, he submitted, was his evidence that Mr Matthys had referred to a termination agreement in that conversation, so that this explains Mr Wilson's subsequent references to that concept in his email to Mr Matthys. These two matters combined, Mr Wilson submitted, support a finding that in the email Mr Wilson was not speaking about any agreement, that is, the Termination Agreement, of which he had knowledge prior to that first conversation with Mr Matthys.

630 I do not accept that submission. Mr Wilson was writing the email on a serious occasion where he knew that his successor at Quintis was concerned, and wanted to know what Mr Wilson knew about the termination of the Galderma Agreements. Mr Wilson could be expected to choose his words with care, even allowing for the stressful circumstances. The email says, in terms, that he was aware that Galderma had entered into an agreement with Santalis because Dr Castella had advised him. His own evidence was that Dr Castella told him about that in December 2016. The email says that he was aware from Dr Castella that the agreement concerned, not just Benzac, but termination of the Galderma Agreements. This is quite clear and quite specific, and contrary to the submission that the idea of an agreement of that kind only entered Mr Wilson's head because of his conversation with Mr Matthys. The fact (on Mr Matthys's evidence) that Mr Wilson did not mention the agreement in his first conversation,

and spoke only in general terms of Galderma making a decision by 1 July 2017, could be explained by any number of hypotheses, but in any event it is consistent with Mr Wilson's email, sent shortly after the conversation, and does not detract from the plain meaning of that email.

631 *Eighth*, there is the further email from Mr Wilson to Mr Matthys sent on 9 May 2017 referred to at [392] above. The tenor of this is that the Termination Agreement was not material, not that Mr Wilson had been unaware of it (although he did refer to it as 'this agreement Paul and Ian have signed').

632 *Ninth*, there is Mr Wilson's text message to Dr Castella on 9 May 2017 in which he says 'I thought the drop dead date on contract was July'. Once again, in referring to the drop dead date on the contract - the Galderma Agreements - this is inconsistent with Mr Wilson's evidence about the key conversation of 1 December 2016, and supports Dr Castella's account of the conversation. No source of Mr Wilson's knowledge of this 'drop dead date on contract' is apparent from the evidence other than the conversations in December 2016 (or, possibly, having been given the Termination Agreement in February 2017).

633 *Tenth*, there are the text messages of 13 May 2017 set out at [402] above. These talk about the terms of the Termination Agreement and the fact that Galderma had signed with Santalis, when there is no evidence that Mr Wilson had received a copy of it on or after 9 May 2017. As late as 14 May 2017, in an email intended for Mr Bray, Mr Wilson said he had not seen the Termination Agreement. And like the text message of 9 May, those of 13 May contain no hint of surprise, dismay or indignation on Mr Wilson's part that he was blindsided by the existence of the Termination Agreement. Subsequent texts show that Mr Wilson and Dr Castella remained on good terms.

634 Together these items of evidence combine with the inherent plausibility of Dr Castella's version of events, and the inherent implausibility of Mr Wilson's version, to persuade me that on or about 1 December 2016, they did have a discussion in which Dr Castella told Mr Wilson that Galderma wanted to terminate the Galderma Agreements and were taking steps to do so, specifically, the step of providing a draft Termination Agreement to Santalis. ASIC has made out its pleaded case in relation to this issue.

635 For completeness, I will also make findings on two points which are not part of the pleading, but were part of Dr Castella's evidence about the key conversation on 1 December 2016:

namely that Mr Wilson wanted the option to be in the Termination Agreement to give him a basis to defer disclosure to the market; and that he asked Dr Castella not to email him copies of the Termination Agreement as he did not want drafts being sent back and forth. As to the first of these, I find that it was the reason why the option was included in the Termination Agreement. No other possible reason for it emerges from the evidence and it is supported by Dr Castella's contemporaneous emails to Mr Bray and Mr Bechstein. Nor does any reason emerge why Dr Castella, and not Mr Wilson, would have wanted to defer the need for Quintis, the Australian listed company, to fulfil its Australian disclosure obligations. The objective probabilities support Dr Castella's evidence that Mr Wilson proposed the need for mechanisms to defer the finality of the termination so as to defer the need for disclosure, and I accept that evidence.

636 As to the second of these, I also find that it was said. Once it is found, as I have, that Dr Castella did tell Mr Wilson about the draft Termination Agreement, and discuss its wording with him, there is no apparent reason why he would not have sent drafts to Mr Wilson unless Mr Wilson had asked him not to. As already mentioned, the fact that Dr Castella only sent Mr Wilson one cryptic email about Galderma throughout the events of December 2016, when previously he had been quite forthcoming about the relationship, supports the inference. I make this finding conscious of its seriousness. In my view it has been clearly and distinctly proved.

637 It follows from all these findings that I do not accept Mr Wilson's evidence of the conversation of 1 December 2016, nor his evidence to the effect that he did not speak to Dr Castella about the subject again in December 2016.

(6) What would the hypothetical reasonable director, knowing that Galderma wanted to and was taking steps to terminate the Galderma Agreements, have done?

638 This goes to the first pleaded breach of s 180 of the *Corporations Act*. ASIC alleges that the hypothetical reasonable director, against whose conduct Mr Wilson's acts and omissions are to be judged, would have recognised that Quintis's Board would need to be kept informed of any steps taken by Galderma to terminate the Galderma Agreements and that the Board would need to consider what steps Quintis should take. So, ASIC claims, the hypothetical reasonable director would have told the Board promptly that Galderma wanted and was taking steps to terminate the Galderma Agreements.

639 To recap the principles discussed in Section IV above, this involves an objective standard, to be applied by reference to Quintis's circumstances and the office and actual responsibilities that

Mr Wilson held. It is necessary to consider whether there is a foreseeable risk of harm to the company and what, if anything, the hypothetical reasonable director, who is defined as a person who acts with the degree of care and diligence that a reasonable director of a corporation in Quintis's circumstances would exercise, would have done to remove or reduce that harm. It is necessary to consider the magnitude of the risk, that is the seriousness of the possible harm, and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the hypothetical reasonable director may have, including any benefits that might accrue to the company if some different course of action is pursued or no action at all is taken. It is necessary to do this in a forward looking manner, that is, from the point of view of the person at the time the risk arose.

640 In order to avoid artificiality, I will speak of Mr Wilson's responsibilities and knowledge, and of Quintis's circumstances, before converting that to discussion of the position of the hypothetical reasonable director. Mr Wilson was Quintis's Managing Director. He was the principal executive officer of the company. He had founded Quintis and occupied various executive and non-executive roles in the company since 2000. Before that he had been an experienced commercial lawyer.

641 The evidence considered under the heading of Issue (1) in this section, as well as the general course of evidence set out in detail above, shows that Mr Wilson was an active executive who paid attention to every aspect of Quintis's business and who had a firm grasp of the short and long term commercial ramifications of his actions. There is no suggestion that he delegated his duties to others or that he relied unquestioningly on what they told him. From this I infer that it was part of Mr Wilson's responsibilities to assess and actively manage the commercial aspects of the company's contractual relationships. There was no evidence that there were any express limits on the capacity of the Managing Director to enter into or to authorise contracts made on behalf of the company. But he was Quintis's founder and largest shareholder and while those were not things he did in his capacity as an officer of the company, they suggest that as a matter of fact his responsibilities for making commercial decisions on behalf of the company were extensive.

642 At least after the acquisition of 100% of Santalis in mid-2015, Mr Wilson's responsibilities also included monitoring Santalis's commercial position and reporting to the Board on matters of significance that arose in relation to Santalis. It may be that Mr Wilson was not the exclusive

conduit to the Board for information about Santalis. At Board level, Mr Gooding had interactions with Santalis personnel, and Dr Castella reported to the Board in writing and occasionally in person. At executive level it appears that at least Mr Stevens and Mr Coetzer had contact with Dr Castella and others at Santalis. But Mr Wilson is the only officer of Quintis alleged to have known about the Termination Agreement. So if he is assumed to have known about its execution, and if that was significant, then the hypothetical reasonable director in his position would have had a responsibility to have reported it to the Board.

643 As for the immediate commercial context, I have found that the Galderma Agreements were important to Quintis, not least because of the place they had assumed in the company's market announcements going to its future prospects. The likelihood that they were to be terminated was therefore a matter of significance to Quintis. That likelihood gave rise, in the context of this issue, to a foreseeable risk of harm to the company, being the risk that the agreements would be terminated and that this might damage market perceptions of Quintis's future as a supplier of high quality EISO to the pharmaceutical industry at an attractive price.

644 That risk of harm arose even if it is assumed that the Galderma Agreements were immaterial as a source of revenue over the short term. The lack of revenue under the agreements was precisely because of the failure of Benzac with EISO as a product, and the termination of the Galderma Agreements would confirm that failure publicly in a manner which had not occurred as at December 2016. Given Galderma's obvious desire to end the agreements quickly, the probability of that harm was high. The seriousness or severity of the harm if it were to eventuate, while not catastrophic, was material enough to require action by the Managing Director.

645 That begs the question, though, of what action was required. ASIC says that it is the action of promptly informing the Board that Galderma wanted to and was taking steps to terminate the Galderma Agreements. It submits that there was no reasonable excuse for not disclosing that information to the Board 'so that it could have been appropriately managed or dealt with' (opening submissions para 154.1). ASIC's pleading says that the opportunity the Board lost was the opportunity to make inquiries to ascertain the status of the Galderma Agreements and to consider what steps Quintis should take at that point of time including what it might be able to do to avoid a termination of the Galderma Agreements.

646 But it is implicit in those allegations that the Board, and not Mr Wilson (and Dr Castella) were the people best placed to identify and take the appropriate steps. In order to ascertain whether

that is so, it remains necessary to identify precisely what steps were appropriate or open to Quintis. It is pleaded as a loss of opportunity, but in order to be significant in the balancing exercise the Court must perform, that opportunity must hold some value. In closing submissions ASIC posited that the steps the Board might have taken included:

(a) devising a strategy to disclose the imminent termination of the Galderma Agreements to the market, or the uncertainty that they would continue;

(b) opening discussions with Galderma on a reversion of the Benzac brand or on Rx deals; and

(c) accelerating or focusing on entering new commercial arrangements with other potential customers in the pharmaceutical sector.

647 But there was little evidence that any of the possible courses of action posited by ASIC were likely to lead to any real benefit to Quintis, or that the ability to take them would have been significantly enhanced if Mr Wilson had told the Board in early December 2016 about the likely impending termination of the Galderma Agreements.

648 Notably, ASIC adduced no evidence from any of the Quintis officers who gave evidence as to what they would have done if they had been told in early December 2016 that Galderma wanted to and was taking steps to terminate the Galderma Agreements. Mr Wilson, in effect, made a *Jones v Dunkel* submission that this omission means that the other directors of Quintis would not have availed themselves of the above opportunities. While I do not consider that *Jones v Dunkel* takes me that far, it does permit an inference that the evidence of those directors would not have assisted which strengthens the conclusions unfavourable to ASIC's case that I am about to reach.

649 Instead of direct evidence of what the Board would have done had it been told of the impending termination of the Galderma Agreements, the evidence on which ASIC relied for the first of the above three possibilities was very general evidence from directors of Quintis, and Mr Wilson and Mr Bowers, about how they would go about deciding what to announce to the market, and about the desirability of taking care in the presentation of any announcement. All those things may be accepted, and I have also accepted that non-routine market announcements were a whole-of-Board responsibility. But the evidence was unrelated to information that Galderma wanted to and was taking steps to terminate the Galderma Agreements. It cannot be assumed that the Board would have or should have disclosed the proposed termination of the agreements, as distinct from the fact that they had actually

occurred. There was no real evidence that uncertainty as to their continuation was material information.

650 The second possibility relies solely on Mr Wilson's email of 31 August 2016 suggesting that discussions with Galderma could be progressed or elongated by discussions on a reversion of the Benzac brand to Quintis (see [263] above). But that suggestion was made in August 2016 as a possible stalling tactic and there was no evidence that it was ever a realistic possibility. The alacrity with which Galderma moved towards execution of the Termination Agreement by December 2016 suggests that stalling was not an option by then, if it ever was.

651 Further I have found that there was no reason why the Galderma Agreements needed to be on foot in order to progress discussions about Rx products with Galderma; indeed, in the same breath, as it were, in which Mr McCrea was progressing the termination of the Galderma Agreements he was talking about an 'Rx update' (see [292] above) and Dr Castella's evidence was that he was looking at continuing the relationship with Galderma through their interest in Santalis's Rx program (see [304] above). That theme was also picked up in Mr Wilson's 9 May 2017 email to Mr Matthys (see [386] above) and in the Board's announcements to the market on 6 June 2017 (see [407] above). Also, I have already found that it was implausible that Quintis's negotiating position on Rx deals depended on the continuation of the Galderma Agreements. Any development of an Rx product with Santalis would take place under a separate contract.

652 Similarly, there is no reason to think that prompt disclosure of Galderma's wish to terminate would have put the company in a better position to enter into new commercial arrangements with other customers in the pharmaceutical sector, that being the third possibility suggested by ASIC. Dr Castella's evidence was that Santalis had already been making extensive efforts to develop relationships with other companies who would market OTC or retail products (see [304] above).

653 Another thing that could, in theory, have been done would have been to refuse to execute the Termination Agreement and to insist on Santalis's right to two years' notice of any termination. But that possibility is not part of ASIC's case. No doubt that is because all it would have achieved would have been to secure two more years of the minimum annual royalty totalling US$325,000, an immaterial amount, at the possible cost of Galderma's displeasure, at a time when Quintis wished to keep the relationship on foot for the purposes of potential Rx transactions. What this exposes is that there was a commercial judgment to be made, and given

Mr Wilson's position at Quintis there is no reason to think that the commercial judgment needed to be escalated to the Board in the time available.

654 It is true that the step proposed - informing the Board - would have been an easy thing to do, incurring no cost and no risk. It was probably part of Mr Wilson's duties to disclose it at some point. But as senior counsel for ASIC properly acknowledged in opening submissions, the period of time between Mr Wilson becoming aware of the likelihood of termination and the fact of the execution of the Termination Agreement (as distinct from Mr Wilson's knowledge of its execution) was short. Senior counsel also properly accepted the proposition that Galderma was 'quite keen just to get it done and get it over with' (ts 56). That is borne out by the very quick turnaround that Galderma gave Quintis in relation to proposed changes to the Termination Agreement (see [331] above).

655 It is not enough to say that there was no downside for Mr Wilson to tell the Board what he knew. Nor is it enough to establish that, as a significant development, it was part of Mr Wilson's responsibilities to make the Board aware of the likely termination of the Galderma Agreements in due course. What ASIC has to prove is that in order to have acted with care and diligence, the hypothetical reasonable director would have told the Board immediately, so that the Board was able to act.

656 ASIC has not made out its case as to this because it has not established what that act might have been, or how it would have reduced or eliminated the likely harm to Quintis. The duty of care and diligence cannot be defined without reference to the nature and extent of the foreseeable risk of harm (see *Vrisakis* at 449) and in my view an officer cannot be said to have failed to act with care and diligence by omitting to perform an act unless it has been established that there was at least a real chance that the act would have reduced or eliminated that harm.

657 ASIC cited *Australian Securities and Investments Commission v Lindberg* [2012] VSC 332 as a case where contraventions of s 180 were found to have occurred as a result of a failure by the defendant managing director to inform the board of certain transactions, even though there was no evidence that the board could or would have done anything differently. But that was a case where the fact of the contraventions were admitted, and whether there could be a breach without proof that the board would have responded differently was not in issue.

658 For completeness, I should indicate that there were two further submissions made by Mr Wilson on this subject, which do not form any part of my findings against ASIC. The first

is that the Court should find that to the extent that disclosure to the Board would have led to inquiries being made of Santalis about the status of the Galderma Agreements, Dr Castella would have lied. While I have found that Dr Castella was capable of being less than forthcoming with his colleagues, I have not found that he told a lie in answer to any direct question.

659 The closest the evidence gets to that is Ms Franklin's evidence about the question she asked Dr Castella at the February 2017 Board meeting. I have found that she asked Dr Castella whether Galderma would be buying any more oil and that his answer was 'no' (see [358] above). That was truthful, as far as it went, and although Dr Castella may be criticised for a lack of candour in not going further and explaining that the Galderma Agreements had been terminated, he did give a direct and truthful answer to a direct question.

660 There was also Mr Coetzer's email of 9 May 2017 to Mr Matthys referred to at [382] above, but as indicated there, Mr Coetzer's oral evidence did not come up to the level of the email, and Mr Wilson did not squarely submit that Dr Castella did tell Mr Coetzer the things in the email (it is only mentioned in passing in two footnotes in Mr Wilson's written submissions).

661 Mr Wilson also points to Dr Castella's initial position in discussions with Mr Matthys on 9 May 2017 that the Galderma Agreements had not been terminated. But that was a mischaracterisation of the effect of the reinstatement option, made after Dr Castella had sent the Termination Agreement to Mr Matthys, and I do not find it showed any intention to deceive.

662 The final point to be made about this submission is that even if all the above is evidence that Dr Castella was prepared to lie, it was not evidence that he was prepared to lie *to Mr Wilson*. To the extent that Dr Castella was dishonest, it could have been in complicity with what (on Dr Castella's version of events) was Mr Wilson's desire to conceal the termination from the Board. The evidence does not permit me to be reasonably satisfied that if Mr Wilson had asked Dr Castella about the status of the Galderma Agreements, Dr Castella would have lied. That is so even if the artificiality of the issue in view of my findings about the events of December 2016 is disregarded.

663 The other submission Mr Wilson made which I do not accept is that if Quintis's Board had made inquiries of Galderma about the status of the Galderma Agreements, it would not have provided accurate information. That submission was simply baseless. It was said to have been founded on a *Jones v Dunkel* inference from ASIC's unexplained decision not to call

Mr McCrea (who had provided an affidavit to ASIC). Mr Wilson submitted it must be inferred that he would have given evidence adverse to ASIC. But the furthest a *Jones v Dunkel* inference takes the tribunal of fact is to permit an inference otherwise open to be drawn more confidently: see *Jones v Dunkel* at 308, 312. The inference that Galderma would not have given accurate information is not open to begin with, because there is no direct evidence to support it. To the contrary, the events of 9 May 2017 were set off because Galderma (or Nestlé) gave accurate information to a journalist. Also, in my view, an inference of this kind needs to be tempered with some common sense; there is no suggestion that the question of what Galderma would have said if it had been asked about the Galderma Agreements in early December 2016 featured prominently in the issues to be covered by Mr McCrea's evidence.

664 Nevertheless, for the other reasons I have explained, I do not consider that ASIC has made out its case as to the first alleged breach of s 180.

(7) When did Mr Wilson find out that the Galderma Agreements had been terminated?

The case that ASIC has put

665 It is necessary to frame the issue as to when Mr Wilson found out about the termination of the Galderma Agreements by way of a close examination of the case that ASIC pleaded and the case that it put in closing submissions. I have described the pleadings in some detail in Section III where, unimaginatively, I started at the beginning and worked forward. Here, it helps to sharpen appreciation of the issues to work back from the relevant allegation of breach.

666 That breach is said to have occurred because in the period between early December 2016 and Mr Wilson's resignation as a director of Quintis on 27 March 2017, alternatively the period between ASX's query of 24 March 2017 and the 27 March Response, Mr Wilson failed to inform the Board of the execution of the Galderma Termination Agreement: SOC para 37(b)(ii). The essential facts on which this is based are pleaded at SOC paragraphs 19-21, with paragraph 19 being the most controversial. It alleges that the hypothetical reasonable director would have recognised that the Board needed to determine whether, in order to comply with its continuous disclosure obligations, it needed to inform the market of the existence of the Termination Agreement in a timely manner, and that if the Board failed to comply with those obligations, that would cause Quintis harm and expose it to the risk of proceedings. It is pleaded that the hypothetical reasonable director would have thus informed the Board promptly of the execution of the Termination Agreement.

667 Importantly, specific matters are said to have been within Mr Wilson's knowledge, and so that of the hypothetical reasonable director, as part of this plea. They include the (uncontroversial) fact of the many mentions of Galderma and Benzac in ASX announcements, annual reports and financial statements, the (controversial) proposition that Quintis thereby represented to the market that the Galderma Agreements were significant for Quintis and the long-term value of its business, and (most controversially) that by February 2017 at the latest, Mr Wilson knew of the execution of the Termination Agreement.

668 The present issue goes to that last allegation about Mr Wilson's knowledge. It appears in SOC paragraph 18 and is particularised by three matters: a telephone conversation between Mr Wilson and Dr Castella on or after 8 December 2016; a telephone conversation between them on or after 15 December 2016; and a plea that in February 2017, Dr Castella delivered a copy of the Termination Agreement to Mr Wilson prior to a Board meeting in Perth.

669 There is, however, no evidence of particular conversations between those two men that occurred on or after those specific dates. ASIC does not rely on any such conversations in its closing submissions to found the allegation that Mr Wilson knew of the execution of the Termination Agreement by February 2017 at the latest. It is true that, according to Dr Castella's first affidavit, he and Mr Wilson spoke by phone 'sometime' after the Termination Agreement was executed and emailed back to Mr Bechstein, but ASIC makes no submission that Mr Wilson learned of its execution that way. ASIC does not submit that Mr Wilson was told that the Termination Agreement had been executed at any time prior to Dr Castella's visit to Perth in February 2017.

670 The result is that ASIC's case in relation to this second alleged breach depends entirely on it satisfying the Court that Dr Castella handed a copy of the Termination Agreement to Mr Wilson before one of the two board meetings that took place in Perth in February 2017. The plea depends on Mr Wilson knowing, not that the Termination Agreement was going to be executed, but that it had been executed. And ASIC does not rely on any inference which might have been open, for example that if Mr Wilson understood as late as 7 December 2016 that the Termination Agreement was going to be executed, then by some time at or around the end of December 2016 he must have known that it had been executed. To find in ASIC's favour in relation to the second breach, the Court must feel an actual persuasion that Dr Castella gave Mr Wilson a copy of the Termination Agreement in Perth shortly before one of the February 2017 board meetings.

ASIC has not made out its case in this respect

671 I am not persuaded that this occurred. Unlike Dr Castella's evidence about what he told Mr Wilson in December 2016, there is no support for it in the documentary record. Unlike that evidence, it is not possible to say that his account is plausible while Mr Wilson's is not. It was an isolated event which, if it did occur, was observed by no one other than Dr Castella and Mr Wilson, and which has left no trace other than in the evidence of those two unreliable witnesses.

672 It is true that when the Termination Agreement became common knowledge on 9 May 2017, Dr Castella told both Mr Matthys and Mr Gooding that he had hand delivered a copy of the Termination Agreement to Mr Wilson in February in Perth. But Mr Matthys's evidence was only that this was the effect of what Dr Castella said, and in an email to Mr Matthys, Dr Castella said (emphasis added) 'We made the status of the contract known to our board and *believe* we delivered a copy of the letter to Frank in person' (Exh 825). The second part of that sentence is equivocal. The first part of it is a formulaic statement which cannot be right, given that the board of Santalis was comprised of Mr Gooding and Mr Wilson and it is common ground, and I accept, that Mr Gooding did not know that the Galderma Agreements had been terminated until 9 May 2017.

673 Mr Gooding's evidence was that on 9 May 2017 Dr Castella had said, also equivocally, and inconsistently with his sworn evidence in this case, that he 'couldn't remember whether he had sent a copy of the agreement to Frank by email, but he thought he had given a copy to Frank in February 2017 when he was in Perth'. So, taken as a whole, Dr Castella's equivocal and self-serving statements in May 2017 do not provide any real support for his evidence. Given my view of Dr Castella's credibility, it would be unsafe to rely on his evidence without independent support. And there simply is none.

674 There were also inconsistencies in Dr Castella's evidence about the occasion on which, he said, he gave the hard copy to Mr Wilson. At one point he said the copy was part of a stack or bundle of materials, at another he just said he gave him a copy. At one point it was done before the Quintis Board meeting on 24 February 2017, at another it was before the Santalis board meeting on 22 February. At one point it was when he and Mr Wilson were going in to the Board meeting, at another point it was in 'the relevant part of the pre-meeting' (ts 241). And despite the comments just above that he 'believe[d]' and 'thought' he had delivered a copy to Mr Wilson,

in cross examination he went as far as saying 'I guarantee I handed Mr Wilson the copy of the contract' (ts 241).

675 These inconsistencies would not be enough, by themselves, to make me discount Dr Castella's evidence, and certainly not enough to find that he is lying; they could reflect the ordinary fallibility of human memory. But in Dr Castella's case they also reflect the cavalier approach with which he gave oral evidence. They simply point to why he is not a witness whose evidence I can rely on unless it finds support in the objective surrounding material.

676 In short, Dr Castella is not a witness on whose credibility alone I can base findings of the gravity involved here, that he gave a copy of the Termination Agreement to Mr Wilson, and then Mr Wilson did not disclose it to the Board. I do not feel an actual persuasion of the occurrence of that first event, which is the only basis on which ASIC alleges that Mr Wilson knew that the Galderma Agreements had been terminated. ASIC has not established the happening of that event to my reasonable satisfaction.

677 Mr Wilson submits further that Dr Castella's story that he gave Mr Wilson a hard copy of the Termination Agreement in February 2017 because of a supposed instruction from Mr Wilson not to send it by email is untruthful. But the evidence does not support that finding. It is premised, once again, on Mr Wilson's theory that Dr Castella's evidence that he believed that everyone at Quintis knew about the termination was clear, so that there could have been no reason why he would not have been able to email the agreement to Mr Wilson. I have demonstrated above that it is not clear at all, and probably reflects Dr Castella's desire at trial to paint his own conduct in a better light. Mr Wilson's submission is carefully selective about the evidence of Dr Castella's that he chooses to find clear and convincing, and the evidence he does not.

678 I do not find that Dr Castella's evidence about giving the hard copy Termination Agreement to Mr Wilson was knowingly false, but I do consider it to be wholly unreliable. I find Mr Wilson's evidence that he did not recollect Dr Castella giving him a copy to be unreliable too, but that unreliability does not establish the negative of Mr Wilson's evidence. ASIC has not discharged its onus of proving this element of its pleaded case.

(8) How likely is it that Quintis breached its continuous disclosure obligations?

679 It will be recalled that the question is framed as it is in the above heading because ASIC is not alleging that Quintis did breach its obligations under s 674 of the *Corporations Act*, or under

the ASX Listing Rules. The question has a twofold relevance to ASIC's case. First, it can be approached in a forward-looking manner as crucial context to ASIC's plea that the hypothetical reasonable director would have recognised that:

(a) the Board would need to determine whether it needed to inform the market of the Termination Agreement in order to comply with its continuous disclosure obligations, and to do so in a timely manner; and

(b) if the Board (ie Quintis) failed to comply with those obligations in a timely manner, it would harm Quintis's reputation, jeopardise market perceptions of Quintis, and expose it to the risk of legal and regulatory proceedings being brought against it, including for contravention of s 674(2).

From which, ASIC pleads, it follows that the hypothetical reasonable director would have then taken all necessary steps to ensure that the Board was promptly made aware of the execution of the Termination Agreement.

680 The likelihood that omitting to disclose the Termination Agreement would entail a breach of continuous disclosure obligations bears on both (a) and (b) above. If the possibility of harm to Quintis is far-fetched, the hypothetical reasonable director would see no need to trouble the Board with it, because that director would both consider that the Termination Agreement had no practical relevance to continuous disclosure obligations and that the chance of a breach leading to harm to Quintis's reputation and market perceptions and the risk of legal and regulatory proceedings was remote. My acceptance, in Section IV above, of ASIC's submission that it is not necessary or appropriate to seek to define the necessary level of risk of breach by the company means that, beyond far-fetched, there is no particular level to which the risk must rise before the duty of the director to act is engaged. It is simply a question to be assessed objectively in all the circumstances.

681 The second way in which this issue is relevant concerns the consequences of any failure by Mr Wilson to inform the Board of the Termination Agreement. They are relevantly pleaded to be that by failing to inform the Board of the execution of the Termination Agreement, Mr Wilson did harm Quintis's reputation, and jeopardised market perceptions of Quintis, and exposed Quintis to the risk of legal and regulatory proceedings. This goes (at least) to the questions of seriousness and material prejudice that must be answered before civil penalties can be imposed.

682 The finding above that ASIC has not established that Mr Wilson knew of the execution of the Termination Agreement removes the relevance of this issue, on both of the bases just outlined. Without that knowledge, he could not have breached any duty of care and diligence to disclose it to the Board, and the issue of the consequences of any such breach does not arise. Nevertheless, as a trial judge, I will proceed to determine this issue of fact on the alternative assumption that it has been established that Mr Wilson knew of the execution of the Termination Agreement.

683 I will also assume the correctness of a matter that was not put in issue, namely that Mr Wilson's (assumed knowledge) of the execution of the Termination Agreement means that Quintis knew of it. No contention was made that if Mr Wilson had known of it, his concealment of it from the rest of the Board would mean that the company, Quintis, did not know about it.

684 As has been said, it is not controversial that Quintis was a 'disclosing entity' for the purposes of s 674 of the *Corporations Act*, and so was required to notify ASX in accordance with the ASX Listing Rules of any material information, that is, information that was not generally available and was information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of shares in Quintis. This would include information that would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of shares in Quintis. The ASX Listing Rules required this information to be notified immediately upon the company becoming aware of the information.

685 In the absence of an allegation that s 674 was breached, I make no finding that it was. But I do find that the risk that s 674 would have been breached, had the termination of the Galderma Agreements not been disclosed immediately upon execution of the Termination Agreement, was a serious one. The only real issue between the parties as to that is whether the fact of the termination was material information in the sense just described. Mr Bowers' evidence comfortably establishes that there was a serious chance that it was. There is no need to go through again why. His evidence speaks for itself and in my assessment it is persuasive. It is logical, sensible and supported by the many Quintis announcements on which he relies. Those announcements created a belief and expectation on the part of investors that the Galderma Agreements were important to Quintis's long term prospects. The news that the agreements had been terminated was likely to cause investors to revise downwards their assessment of those prospects. For some investors, that would be reflected in significantly lower

risk-weighted valuations of Quintis. For others, applying a less quantitative approach, the negative impact would also be significant.

686 Mr Bower's evidence further confirms that the immaterial amount of revenue that had been earned under the Galderma Agreements did not mean that the information that the Galderma Agreements had been terminated was not price sensitive information. It was likely to be price sensitive because of the impact it would have had on investor perceptions of Quintis's long term prospects, perceptions which had themselves been shaped by Quintis's own announcements since the Galderma Agreements were signed in February 2014.

687 Mr Bowers was cross examined on the basis of a hypothetical announcement which Mr Wilson's lawyers had prepared as to how Quintis might have (but did not) announce the termination of the Galderma Agreements. The hypothetical announcement placed the news of the termination in the context of other matters including: that Santalis was in ongoing discussions with Galderma and others about the use of EISO in Rx products; that clinical trials were continuing; that Galderma had indicated potential interest to becoming a future commercial partner with Santalis in relation to those Rx products; and that confidentiality agreements had been signed to facilitate discussions. Mr Bowers accepted that the manner in which information was announced may have the potential to affect the magnitude of the impact attached to the information, but he said that in his report he had made a 'baseline assumption' that any listed company would attempt to present the information in an optimal light.

688 Mr Bowers was clear that in the end, it was not the manner of presentation, but the substantive content of the announcement that mattered, in particular whether the announcement was presenting new information to the market. In that regard, Mr Bowers accepted that the ongoing discussions with Galderma noted in the hypothetical announcement that has just been described, along with the fact of execution of confidentiality agreements to facilitate those discussions, would have been news to the market, had they been announced around the time of the execution of the Termination Agreement. He accepted that this would have led to 'a potential reduction in the magnitude of the negative impact' associated with the announcement of the Termination Agreement (ts 450). But he was not asked, and did not say, whether that reduction would have meant that the negative impact would not be material. It can be inferred from the context of his opinions and evidence overall that he did not consider that it would have.

689 Mr Wilson submitted that this concession by Mr Bowers meant that his opinion should be given little weight. I do not accept that. In my view, this cross examination demonstrated that Mr Bowers was prepared to modify his opinion based on new information. That enhances the confidence the Court can place on his opinion. And to the extent to which that new information undermined his opinion, it can be inferred that the hypothetical announcement contained all the relevant information which, in Mr Wilson's submission, might have reduced the negative impact (posited by Mr Bowers) from the announcement of the Termination Agreement. That information did not lead Mr Bowers to say that the negative impact would have changed from being material to being immaterial. Mr Wilson submitted that, again, Mr Bowers' reasoning process could not be discerned, but that criticism carries little weight given that Mr Bowers was being asked about this in cross examination with little opportunity to reflect or to develop his reasoning.

690 In any event, I would have concluded that the information that the Galderma Agreements had been terminated was likely to be price sensitive, even if I had ruled that Mr Bowers' evidence was inadmissible. As a matter of commercial common sense, I infer that the emphasis Quintis had placed on the Galderma Agreements in its announcements, as strategic landmarks for the company confirming that major counterparties in the pharmaceutical industry were prepared to purchase EISO over a long term at a price of US$4,500 per kg, meant that learning of the relatively early termination of the Galderma Agreements was likely to induce many investors to revise their valuations of Quintis downwards, and to be disposed to sell or not to acquire Quintis shares.

691 That is so even though Quintis had disclosed to the market at the time of announcing the Galderma Agreements that Galderma could terminate them on two years' notice and that it had no commitment to purchase any minimum quantity of EISO. Even if it is assumed that many investors held those matters in mind through to May 2017 - a doubtful assumption given the subsequent tide of positive announcements about the Galderma Agreements which made no mention of those matters - the Termination Agreement was nevertheless significant because it showed that Galderma had chosen to end the contractual relationship, and so that it had decided not to purchase any more EISO. It was the end of Galderma's commercial commitment to use EISO in one of its mass market consumer products, and the associated confirmation that it would not be buying any more EISO, that were significant. Those matters were significant even though, from a legal point of view, Galderma always had a right to end the contractual

relationship (albeit on more notice than it had actually given) and did not have any minimum purchase obligation.

692 ASIC has established that, on the assumption that Quintis knew in mid-December 2016 that the Galderma Agreements had been terminated, a failure to immediately disclose that placed the company at serious risk of contravening s 674 of the *Corporations Act*, and the ASX Listing Rules.

(9) What would the hypothetical reasonable director with knowledge of the termination of the Galderma Agreements have done?

693 This issue goes to ASIC's second pleaded breach, where it is alleged that the hypothetical reasonable director would have recognised that the Board would need to determine whether it needed to inform the market of the existence of the Termination Agreement in a timely manner in order to comply with its continuous disclosure requirements, and would have recognised that if the Board failed to comply, that would harm Quintis's reputation, jeopardise market perceptions of the company and expose it to the risk of legal and regulatory proceedings being brought against it. This allegation is based, in part, on the plea that Mr Wilson knew of the execution of the Termination Agreement, so the finding that ASIC has not established that plea means that this allegation of the second breach fails. But it is appropriate for me to make findings on the issue in case I am wrong about that.

694 I have commenced the exercise of deciding what the hypothetical reasonable director would have done under Issue (6) above. To that must be added the assumption (not in fact established here) that the hypothetical reasonable director learned of the execution of the Termination Agreement in February 2017.

695 In relation to continuous disclosure, although Mr Wilson did not have sole responsibility for the preparation, approval and authorisation of market releases, he clearly took an active part in those things, at least for non-routine announcements to the ASX. That and Mr Wilson's long experience as a businessperson and executive officer of Quintis, as well as his previous experience as a lawyer, all satisfy me that he was aware of the company's continuous disclosure obligations under the *Corporations Act* and the ASX Listing Rules. He knew that if information was information that a reasonable person would expect to have a material effect on the price or value of shares in Quintis, then the company was required to disclose it to the market immediately.

696 The hypothetical reasonable director in Mr Wilson's position must also be taken to have known of the tenor of the ASX announcements and other public releases on which ASIC relies - many of them are attributed to Mr Wilson. He authorised and approved all significant releases to the market; it may be inferred that he may not have authorised more routine or legalistic notices but the majority of the 84 announcements here do not fall into that category.

697 The hypothetical reasonable director with knowledge of the content of those announcements would have been aware that by making the numerous announcements that Quintis had made about Galderma and Benzac, the company had, to a significant extent, linked investor perceptions about its long term prospects to the status of the Galderma Agreements. It would not have taken an expert report from someone like Mr Bowers for the director to be aware of that; in many respects Mr Bowers' report is what Lee J in *GetSwift* referred to as 'applied common sense' (at [1159], [1208]). But Mr Bowers' report does confirm what common sense tells one; that the Galderma Agreements were important to Quintis because it had repeatedly told the market that they were important. Even if it might have been possible to infer from published financial figures that they were not providing a material amount of revenue, that would not have detracted from the main message, described in detail by Mr Bowers, about their significance to Quintis's long term prospects.

698 At this point the finding under Issue (8) above also becomes relevant, namely that there was a serious risk that if Quintis did not promptly inform the market of the termination of the Galderma Agreements, it would be in breach of its continuous disclosure obligations. Again, although I have found the existence of that risk substantially on the basis of Mr Bowers' expert evidence, I do not consider that an expert report would be necessary before the hypothetical reasonable director would recognise the existence and seriousness of the risk. It was apparent at the time as a matter of commercial common sense. It would have and should have been apparent to an experienced lawyer, businessperson and executive officer of a public listed company like Mr Wilson.

699 I am further satisfied that Mr Wilson knew that if Quintis failed to comply with its continuous disclosure obligations in a timely manner, that would jeopardise market perceptions of Quintis and expose it to the risk of legal and regulatory proceedings being brought against it, including for contravention of s 674(2) of the *Corporations Law*. It is necessary to pause to make a couple of observations about this finding.

700 First, Mr Wilson's submissions placed some emphasis on the need for ASIC to prove these matters of fact in order to succeed. He pointed to the absence of direct evidence about them, beyond the evidence of the class actions as proceedings that had subsequently been commenced. It was not abundantly clear, with respect, whether this was being put in relation to allegations that the breaches *in fact* had these adverse consequences, or also in relation to the allegation that the hypothetical reasonable director, looking forward, would have *recognised* that they would.

701 Relatedly, Mr Wilson submitted that ASIC's plea at paragraph 36A of the SOC - that by failing to inform the Board of the Termination Agreement, and by authorising and approving the 27 March Response, 'Mr Wilson harmed Quintis' reputation, jeopardised market perceptions of Quintis and exposed Quintis to the risk of legal and regulatory proceedings being brought against it' (see [54] above) - was part of its plea of contravention of s 180, and not just part of its plea as to the consequences of the alleged breaches. If so, it may indeed be necessary before reaching any conclusion of contravention to find that Mr Wilson's conduct *did* have those consequences.

702 On my reading of the SOC, I doubt that paragraph 36A is part of the allegation of breach of s 180. As has been made clear, actual damage or harm to the corporation is not an element of breach of the section. And when ASIC comes to plead the conclusion that there have been contraventions of s 180, it relies on earlier paragraphs of the statement of claim, and not on paragraph 36A (see SOC para 37). However ASIC's closing submissions repeatedly enlist paragraph 36A as part of the allegation of breach, not just as the consequences of the breach, so it is necessary to proceed on the basis that it is a necessary element of contravention. That being so, it is not enough for ASIC to establish that the hypothetical reasonable director would have recognised risk of adverse consequences, it must also be established that the adverse consequences pleaded in paragraph 36A came about. For the same reasons, that is also true of the adverse consequences of the representations in the 27 March Response that are pleaded in paragraph 36 of the SOC, namely that they exposed Quintis to the risk of legal proceedings being brought against it.

703 Nevertheless, senior counsel for Mr Wilson properly, and inevitably, accepted that it is open to the Court to make inferences about whether such consequences have occurred. On that basis, I find that ASIC has made out both that the hypothetical reasonable director would recognise that breach of continuous disclosure obligations would jeopardise market perceptions and that

it would expose Quintis to the risk of legal and regulatory proceedings. Since the risk of breach of the continuous disclosure obligations was a serious one, the risk of these adverse consequences was at least real and not far-fetched.

704 I also find that Mr Wilson's conduct in failing to tell the Board about the termination of the Galderma Agreements did have those consequences. In paragraphs 36 and 36A, when they are pleaded as having actually occurred, what is said to have occurred is still described in terms of risk or potentiality. To jeopardise market perceptions is to give rise to a risk or potential that the market will perceive Quintis adversely. That is what the word 'jeopardise' means. And the plea about legal and regulatory proceedings is a plea as to exposure to a risk of those things.

705 It is open to the Court to make inferences from the usual course of affairs that risks of those kinds can arise. It is notorious that when companies have breached their continuous disclosure obligations, they are sometimes the subject of adverse public comment, and can sometimes be the subject of proceedings from ASIC or from private litigants, often in a class action brought on behalf of a number of shareholders. The same may be said of potentially misleading representations about Quintis's relationship with Galderma and continued supply of EISO to it. Adverse public comment and legal proceedings for breaching the *Corporations Act* have the potential to lead many investors in the market to think less of Quintis's probity and corporate governance. That jeopardises, that is, risks harm to, market perceptions. Direct evidence is not required to establish any of these propositions. Further, I do not accept Mr Wilson's submission that expert evidence is necessary to prove them.

706 I make those findings despite Mr Wilson's submission that the drop in share price when the Termination Agreement was announced on 10 May 2017 is not evidence that market perceptions were jeopardised. ASIC relies on that fact as a particular of the allegation. I accept Mr Wilson's submission, because it seems to me that in the absence of expert evidence the Court is unlikely to be equipped to determine what has caused a drop in the share price. Indeed, on ASIC's own case, the fact of termination of the Galderma Agreements was price sensitive information, so disclosure of it could have led to the share price drop independently of jeopardy to market perceptions caused by the apparently belated nature of the disclosure. An analysis of the kind described in *Earglow* (see [150] above) might permit the cause to be linked to market perceptions of Quintis, but no such analysis has been presented here. But even if the drop in the share price is disregarded, the jeopardy to market perceptions is obvious.

707 In the case of legal proceedings, there are two class actions on foot which include allegations of breach of s 674 by Quintis in connection with alleged failure to disclose the termination of the Galderma Agreements. That straightforwardly supports the inference that Quintis was exposed to a risk of such proceedings. Mr Wilson submits that I cannot know whether those proceedings have any merit. But there is no suggestion that they have been struck out or are liable to be struck out for having no reasonable prospects of success, and the mere fact that they have been commenced and are on foot is prejudicial to the company. They are not bizarre unforeseeable events. It must follow that Mr Wilson's actions in not disclosing the termination of the Galderma Agreements exposed Quintis to a risk of legal proceedings that has been manifested in the proceedings actually commenced.

708 The extant class actions do not include allegations about misleading representations contained in the 27 March Response, and so do not provide the same support for findings that the potentially misleading nature of that release exposed Quintis to the risk of legal proceedings. But as described above, I am nevertheless prepared to infer that the making of the representations did expose Quintis to that risk.

709 I do not, however, find that the hypothetical reasonable director would have recognised that if the Board failed to comply with its continuous disclosure obligations in a timely manner, that *would* harm Quintis's reputation, or that Quintis's reputation *has been* harmed. That matter is different from the other two because it is not speaking of risk and potential. Whether the harm to Quintis's reputation *would* result would depend on the nature of the breach, the circumstances as to whether, when and how it became public knowledge, and the consequences including whether legal or regulatory proceedings were brought and whether they were successful. Whether that harm *has* resulted is not, in my view, a matter that can be found purely on inference. Some direct evidence that persons have thought less of Quintis because of what occurred is necessary, and none has been adduced.

710 ASIC's failure to establish that third matter would not, however, mean that its case of breach would fail (assuming that it had not failed for a different reason). The pleas of the three matters which the hypothetical reasonable director would have recognised, and the three consequences which have occurred, are properly understood as putting Mr Wilson on notice that ASIC will seek to establish each of those matters as particulars of why the hypothetical reasonable director would have recognised a risk of harm to the interests of the corporation, and of the adverse

consequences that did result from the breach. The fact that two of the matters have been established is sufficient to make the pleas out.

711 Finally, I am further satisfied that the hypothetical reasonable director, recognising those things, would have promptly informed the Board of the execution of the Termination Agreement. While that conclusion rests on my assessment of what, objectively, that hypothetical person would have done, it is relevant that the general view of several of Quintis's directors was that, in their time, they expected that a matter significant enough, like the termination of the Galderma Agreements, would be brought to the attention of the Board so that it could decide whether disclosure was necessary.

712 The conclusion that the hypothetical reasonable director would have promptly informed the Board is also supported by the evidence of several directors who referred to Quintis's continuous disclosure policy which was available to all employees. That policy 'established procedures for the internal reporting of information which may be significant' (JM1 para 13). Mr Matthys, Mr Gooding, Mr Groppoli, Ms Franklin and Mr Kay also gave evidence of a standing agenda item for the Board to consider whether any information about Quintis ought to be disseminated to the market via an announcement (JM1 para 12). According to Mr Matthys, the policy required that company officers 'should err on the side of caution and report information even if they were unsure of its materiality' so that the Board could consider it (JM1 para 14). The standing agenda item to discuss issues of disclosure would have prompted the hypothetical reasonable director to inform the Board of the Termination Agreement so that it could decide whether disclosure to the market was required.

713 For all the reasons canvassed, the termination of the Galderma Agreements was a matter of significance that would be appropriate to be addressed at Board level, the hypothetical reasonable director could have done it easily, and there would have been no countervailing responsibilities, or risks to the corporation, as reasons not to do it. If, contrary to my findings, ASIC had established that Mr Wilson knew about the Termination Agreement, then this aspect of ASIC's case would have been made out.

(10) What did the 27 March Response convey to the market?

714 This issue arises out of ASIC's plea that the 27 March Response was potentially misleading. ASIC alleges that the response included representations that as at 27 March 2017, Galderma was one of Quintis's customers, and that it would continue to sell EISO to Galderma at US$4,500 per kg until 2034.

715 The relevant parts of the 27 March Response are set out at [367] above. It was given in response to a query from the ASX for the names and any material information in relation to each of buyers in specified countries or regions referred to in particular announcements Quintis had made, all from 2016 and 2017. One of the countries specified in the response was the US. Many but not all members of the relevant audience for the announcement - investors, stock brokers and investment advisers - could be expected to read the announcement attentively without necessarily focussing on every detail or comparing it with announcements that Quintis had made in prior years, such as the February 2014 announcement of the execution of the Galderma Agreements.

716 The relevant section of the 27 March Response was headed simply 'Names of customers'. It then said 'Quintis sells sandalwood to a variety of buyers across a range of both markets and countries.' This speaks in the present tense. The rest of the section is then divided by headings into 'High value Indian Sandalwood (Album)', 'Lower value Australian Sandalwood (Spicatum)' and 'New institutional plantation investor in 2016'. Under the first of these, the relevant table is described as listing 'customers Quintis has supplied wood or oil to under multi-year contracts'. All of the contracts are listed out with signing years (in one case also an 'effective' year) and contract terms (durations) which suggest that they are current as at the time of the announcement in 2017. The Galderma Agreements are listed as having been signed in 2014 and having a term of 20 years. There is no indication that the term has in fact been curtailed by termination of that agreement. Finally, the text immediately after the table contrasts the customers in it with those who 'acquire' (again, present tense) its Indian Sandalwood products but 'have not entered into long-term contracts'.

717 In my view all this, taken together, does make a representation that Galderma was one of Quintis's customers as at 27 March. For the most part, it speaks of customers in the present tense, implying that the businesses identified in it are present customers of Quintis. The sole potential qualification to that - the statement that the table lists customers to which Quintis 'has' supplied wood or oil - is too mild and equivocal to negative that overall implication. That is especially so given that the table does not distinguish between present and past customers. The implication that Galderma was a present customer as at 27 March 2017 was only likely to have been cemented by the reference to a contract term of 20 years starting in 2014, with no statement that the 20 years had been reduced by agreement to just under three years. The contrast between customers including Galderma and other customers who 'have not entered

into long term contracts' further implies that the contract with Galderma *is* long term and hence on foot.

718 For the same reasons, I find that the 27 March Response also conveyed that Quintis would continue to sell EISO to Galderma at US$4,500 per kg until 2034. That is simply the ordinary natural meaning of the details given in the row in the table. Once again, the hint contained in the term 'has supplied' is insufficient to displace that in all its context.

719 Mr Wilson submitted that no reasonable person reading the 27 March Response would have understood it to have conveyed this particular representation because the announcement of the Galderma Agreements in February 2014 said that they were terminable on two years notice, and in any event a reasonable person reading the 27 March Response would understand that agreements are often terminated before the end of their term. He further submitted that the lack of any minimum volume commitment in the Galderma Agreements, as stated in the table in the 27 March Response, meant that the statement said nothing about the supply of EISO in the future. But these submissions both exaggerate the representation actually pleaded and conveyed and place too much emphasis on the precise minimum contractual commitments.

720 The submissions exaggerate because they try to convert the pleaded representation to being one where it is said that Quintis's supply of EISO to Galderma would not cease before 2034 under any circumstances. That is not what the 27 March Response is said to convey. Read sensibly without straining to extract an extreme meaning, the representation is that there is a present state of affairs under which supply to Galderma will continue. That this might change in the future, including because of Galderma's exercise of its disclosed contractual rights, does not detract from the making of that representation.

721 Mr Wilson's submissions place too much emphasis on the precise contractual terms because the test is what the announcement would have conveyed to an ordinary reasonable member of the class of investors in securities in Australia, not to a lawyer attentively considering all possibilities which the text of the announcement may have left open. That hypothetical investor would have understood the reference to Galderma as a customer of Quintis, at a specified price and for a specified contractual term, to mean that EISO would continue to be sold to Galderma at that price and for that term. It may be that if the investor had turned their mind to it, he or she would have assumed that there would be circumstances in which that contractual term may have been curtailed. But that possibility is not identified in the 27 March Response. A reasonable person reading the announcement attentively, but without focus on all the

possibilities inherent in the legal position, would have understood it to refer to a state of affairs that was on foot, and that was projected to continue for 20 years from 2014.

(11) Was the 27 March Response potentially misleading or deceptive?

722 It follows from my findings as to the representations made in the 27 March Response, from the uncontentious point that the 27 March Response was conduct in relation to a financial product, and from the fact that the Termination Agreement had been executed in December 2016 with effect from 1 January 2017, that the 27 March Response was, at least, potentially misleading or deceptive or likely to misleading or deceive, and so potentially in breach of s 1041H of the *Corporations Act*. Contrary to the first representation found above, the Termination Agreement meant that at least since 1 January 2017, Galderma had not been one of Quintis's customers. It also meant that there was no reasonable basis for the second representation that Quintis would continue to sell EISO to Galderma at US$4,500 per kg until 2034. Mr Wilson does not submit that the presence in the Termination Agreement of the six month option to reinstate the Galderma Agreements meant that either of the representations were not misleading or deceptive as at that date.

723 ASIC has, as it happens, pleaded and proved every element of an actual contravention of s 1041H, and it is difficult to see how the Court can then find only that the contravention is potential. But given my ultimate conclusion (explained immediately below) that ASIC has not established its pleaded case that Mr Wilson contravened s 180 in relation to the issue of the 27 March Response, it is not necessary to try to square that circle. It is enough to say that this element of ASIC's case has been established.

(12) What would the hypothetical reasonable director have done before authorising and approving release of the 27 March Response?

724 This issue arises on ASIC's plea that the hypothetical reasonable director with the same responsibilities and knowledge as Mr Wilson acting with care and diligence would have informed the Board of the execution of the Termination Agreement before the 27 March Response was published, and would not have authorised and approved that response without also taking all necessary steps to ensure that the execution of the Termination Agreement was disclosed to the market before or at the same time as the response. ASIC's case breaks this into the third and fourth alleged contraventions because one contravention is pleaded to arise out of the first potentially misleading representation conveyed by the 27 March Response (that Galderma was one of Quintis's customers), and one contravention arises out of the other

representation (that Quintis would continue to sell EISO to Galderma at US$4,500 per kg until 2034).

725 It is important to note that what ASIC alleges should have been disclosed to the Board and the market so as to dispel those representations is the execution of the Termination Agreement, not that Galderma wanted to and was taking steps to terminate the Galderma Agreements. This makes it clear that only if ASIC establishes that Mr Wilson knew of the execution of the Termination Agreement could he be found to have breached s 180 by permitting the 27 March Response to be released (on ASIC's primary, not alternative case). Mr Wilson's submissions emphasised that point repeatedly and ASIC did not cavil with it. Since ASIC has not established that knowledge, its case as to the third and fourth breaches must fail. Nevertheless I will make findings of fact concerning other aspects of these alleged contraventions, in case I am wrong about Mr Wilson's state of knowledge.

726 In my view, the potentially misleading nature of the 27 March Response was apparent on its face, or at least should have been apparent to a reasonable director in Mr Wilson's position. The representations I have found it to have contained are not obscure or hidden in the document. A person taking reasonable care to look after the interests of the company would have seen that to include Galderma in a table of Quintis's customers when it had terminated the contractual relationship some three months before would have the potential to mislead the market. It is not necessary to couch the issue in terms of some calculus of risk versus benefit and ASIC's case of contravention does not do so. It is axiomatic that a listed company should not issue a potentially misleading announcement to the market, and that a reasonable director acting with due care and diligence would not permit it to do so.

727 That, coupled with the findings I have made above that one of Mr Wilson's responsibilities was to monitor and inform the Board about matters affecting Santalis's commercial position, prospects and performance, means that the hypothetical reasonable director assumed to have knowledge of the Termination Agreement would have disclosed its existence to the Board before it authorised the release of the 27 March Response, and would have ensured that the fact that Galderma was no longer a customer of Quintis was disclosed to the market in or before the 27 March Response.

(13) What enquiries would the hypothetical reasonable director have made before authorising the 27 March Response (the alternative case)?

728 It will be recalled that the tenor of the alternative case is that even if Mr Wilson did not know that the Galderma Agreements had been terminated, he knew that there was a real possibility that they might have been, and so should have made enquiries about their status before authorising and approving the 27 March Response.

729 However it is necessary of course to address the case, not on the basis of its general tenor, but on the basis of the specific way in which ASIC has pleaded it. When that is done, it becomes apparent that the alternative case must proceed on a basis that is inconsistent with findings I have already made. The alternative case is that the hypothetical reasonable director with knowledge of the matters pleaded in paragraphs 14 to 14C of the SOC would have taken steps to inform himself as to whether the Galderma Agreements remained on foot before he authorised and approved the 27 March Response: SOC para 30. Importantly, and as has been said, paragraphs 14 to 14C do not include the knowledge I have found Mr Wilson did have that is pleaded at paragraph 16, that Galderma wanted and were taking steps to terminate the Galderma Agreements. So the alternative case requires me to assess Mr Wilson's conduct in March 2017 on the premise, contrary to my findings, that he did not know by early December 2016 that Galderma was taking steps to terminate. Nor does that case include Mr Wilson's evidence, which I have not accepted, that Dr Castella told him Galderma were piling on the pressure to discontinue Benzac.

730 I have found that paragraphs 14 to 14B of the SOC are made out; they essentially cover the many ASX announcements, annual reports and financial reports mentioning the Galderma Agreements and/or Benzac and the representations that they conveyed. Mr Wilson knew about them.

731 The plea of knowledge at 14C has also been made out, and is considered under Issue (4) above. It will be recalled that the plea is particularised by reference to seven documents (plus two other matters) which establish comfortably that by September 2016 at the very latest, Mr Wilson did know that there was a real possibility that Galderma would seek to end the Galderma Agreements. Mr Wilson did not seriously contend to the contrary. The main basis on which he fought this claim of breach was instead that all the other members of the Board knew of that possibility as well, and they participated in the authorisation and approval of the 27 March Response, and they made no inquiries about the status of the Galderma Agreements.

732 I have already explained why that is not to the point. Further, the attempt to draw equivalence between Mr Wilson's state of knowledge and circumstances, and that of the non-executive directors, is of doubtful validity. Mr Wilson was the person who was in constant contact with Dr Castella about the Galderma Agreements and the business of Santalis generally. He is the one who repeatedly expressed concern and asked for news about Benzac. It is not relevant that bare information, from which it can be inferred that there was a real possibility that Galderma would seek to terminate the Galderma Agreements, can be shown to have been communicated to the other directors (even where they give evidence, in hindsight, that they knew of that possibility). We are assessing the behaviour of human beings, not automata programmed with certain pieces of information.

733 There is, however, a simpler, and in my view stronger, reason to hold that the hypothetical reasonable director in Quintis's circumstances with Mr Wilson's knowledge and responsibilities would not have made inquiries to ascertain the status of the Galderma Agreements. The reason is that, having been in constant contact with Dr Castella throughout 2016 about the continuation of the agreements, not to mention with Galderma personnel, the hypothetical reasonable director would have been acting reasonably to assume that if Galderma were to take steps to terminate, he would have been told about it. Dr Castella was reporting regularly to Mr Wilson throughout 2016. For reasons canvassed in detail above, he must have known that Mr Wilson wished to know of any step by Galderma to terminate the agreements. And the hypothetical reasonable director would have known that Dr Castella was aware of that wish.

734 The contractual context was also relevant; Mr Wilson was entitled to assume that if Galderma did wish to terminate the Galderma Agreements, it would do so on two years' written notice. That was an event which was unlikely to be kept from him. It transpired differently but given the way the case is pleaded I cannot take the actual events of December 2016 into account, and there is no hint in the course of events before then that Galderma would insist on a waiver of the two years' notice.

735 Despite Mr Wilson's strenuous efforts at trial to paint Dr Castella as a deceitful person, looking at the matter objectively as at 27 March 2017, he had no reason to think that Dr Castella would have been anything less than forthcoming. And although I cannot take into account my findings on the contested conversation of December 2016, it seems to me that I can take into account that Mr Wilson and Dr Castella were in frequent contact about numerous matters up to and

during that month and there is no reason to think that changed moving into early 2017. In relation to this alternative case no facts presented themselves to Mr Wilson to indicate that he could not rely on Dr Castella: cf *Maxwell* at [119] above.

736 Also, although I have not found that Dr Castella should have told Mr Coetzer about the termination of the Galderma Agreements, the fact that Mr Coetzer was in place as another line of communication from Santalis to Quintis would have given the hypothetical reasonable director in Mr Wilson's position further comfort that if steps were taken to terminate the Galderma Agreements, he would be told.

737 Further, Ms Franklin, who I have found was a convincing witness, said in cross examination that when a brand is not performing there are processes of re-evaluating and taking action (see [544] above). She gave the examples of modifying the percentage ingredients, taking a lower margin or investing more in marketing and pointed to the inclusion of TFS's logo on Benzac's packaging as an encouraging development. Mr Gooding also said in cross examination that he recalled that the 'packaging was going to be redone' with 'TFS put on packaging' as well as 'some more marketing dollars put to it'. He said 'it was still alive because of the new packaging and, hopefully, things may have improved' (ts 299).

738 In circumstances where Mr Wilson had been told as late as September 2016 that TFS's logo was on packaging and being sold in Walmart, and that Santalis and Galderma were reviewing the options available to them, Mr Wilson was entitled to think that the Galderma Agreements would not have been terminated without him receiving prior notice.

739 Finally, although it was important to make sure that the 27 March Response was accurate, it was prepared in response to wide ranging queries prompted by the Glaucus Report. Galderma was not its focus and it was prepared under circumstances of some urgency. That too must be taken into account in deciding whether the hypothetical reasonable director would have checked on the status of the Galderma Agreements.

740 For those reasons, on the counterfactual assumption that Dr Castella did not tell Mr Wilson in December 2016 that Galderma wanted to and was taking steps to terminate the Galderma Agreements, I do not consider that the hypothetical reasonable director in Mr Wilson's position as at late March 2017 would have made inquiries of the status of the Galderma Agreements before authorising and approving the release of the 27 March Response. Consequently, ASIC's alternative case of breach fails.

741 For completeness I record once again that I do not accept Mr Wilson's submission that if inquiries had been made of Dr Castella, he would not have given a truthful response.

(14) What adverse consequences did the alleged failure to disclose the termination, and the release of the 27 March Response, have for Quintis?

742 Because of the way that ASIC put its case at trial, I have already had occasion to make findings about this under Issue (9) above. I have found that the 27 March Response did jeopardise market perceptions of Quintis and did expose it to risk of legal and regulatory proceedings, but it has not been established that it harmed Quintis's reputation.

743 It is important to appreciate that these findings are about exposure to risk, not about harmful events consequent on risks being realised. In that regard, the only evidence of potentially adverse events consequent on the failure to disclose until 10 May 2017, or on the 27 March Response, is the commencement of the two class actions, and the write off of AU$7.9 million in intangible assets.

744 As to the first of these, it can be inferred that if the termination of the Galderma Agreements, had been disclosed in a timely manner, the class actions would not have contained any allegations of failure to disclose it. That abstract proposition must, however, yield for the purposes of this judgment to the finding that ASIC has not discharged its burden of establishing its pleaded case that Mr Wilson was informed of the execution of the Galderma Agreements in February 2017. It is also not clear whether disclosure in February 2017 would have been sufficiently timely to have precluded any allegation of breach of continuous disclosure obligations.

745 As to the AU$7.9 million write off, there was no evidence that this accounting entry prejudiced Quintis. ASIC does not rely on it as an adverse consequence of the alleged breaches, but rather as a basis to say that the breaches were significant, because the write off demonstrates that the nature of the information not disclosed was significant.

746 Therefore the evidence does not permit any finding that Mr Wilson's alleged breaches resulted in actual damage to the interests of Quintis or its shareholders, as distinct from a risk of such damage.

(15) Which of the five alleged contraventions of s 180 occurred?

747 In summary, ASIC has not succeeded in establishing that Mr Wilson breached s 180 in any of the five ways alleged.

748 In relation to the first alleged breach, that is essentially because I do not consider that the hypothetical reasonable director would have told the Board that Galderma wanted to and was taking steps to terminate the Galderma Agreements, when it has not been established that there was anything that the Board could have done to prevent that termination or to minimise the harm to Quintis's interests it would cause.

749 The second, third and fourth alleged breaches have not been made out because ASIC has not discharged its burden of proving that Dr Castella gave a copy of the Termination Agreement to Mr Wilson before a board meeting in February 2017.

750 The fifth, alternative, breach has not been made out, essentially because I consider that the hypothetical reasonable director would have been acting reasonably by proceeding on the basis that if Galderma had terminated the Galderma Agreements, or told Santalis that it wished to do so, he would have been told. Due to the way the alternative case was pleaded, I reach that conclusion on the assumption, contrary to my findings, that Dr Castella did not in fact tell Mr Wilson in December 2016 that it wanted and was taking steps to terminate the Galderma Agreements.

(16) Did any contraventions that are found to have occurred materially prejudice the interests of Quintis or its members, or were they serious?

751 Since none of the alleged breaches of s 180 have been made out, it is not appropriate to consider this question. If I were to consider it, I would not go beyond the findings of fact I have already made. No evidence was adduced on this point other than that already canvassed. To evaluate the questions of material prejudice and seriousness flowing from contraventions that have not been established to have occurred would be an arid exercise, in which a number of hypothetical combinations of contraventions or of alternative contraventions would need to be entertained.

VIII. OUTCOME

752 ASIC has not established any of the alleged breaches of s 180. I will hear from the parties as to the appropriate orders.

I certify that the preceding seven hundred and fifty-two (752) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackson.

Associate: 

Dated: 28 August 2023