FEDERAL COURT OF AUSTRALIA

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Australian Securities and Investments Commission v Ryan [2024] FCA 1267

File number(s):	VID 605 of 2023
Judgment of:	**O'CALLAGHAN J**
Date of judgment:	6 November 2024
Catchwords:	**CORPORATIONS** – duties of directors – allegation that defendant contravened statutory duties as a director under ss 180, 181(1)(a) and 182 of the *Corporations Act 2001* (Cth) – where no allegation that defendant was motivated by or gained any personal benefit or advantage – where no allegation that creditors suffered any loss – where alleged that by voting in favour of certain resolutions when the company was nearing insolvency the defendant contravened ss 180, 181(1)(a) and 182, because the resolutions materially prejudiced the company's ability to pay its creditors – where resolutions gave effect to two things: a change in the constitution of the subsidiary so as expressly to permit its directors to act in the best interests of the holding company; and entry by the subsidiary into a deed of acknowledgment of debt between it and the holding company – where alleged that the resolutions materially prejudiced the subsidiary's ability to pay its creditors, because the purpose and effect of the deed was to prevent a voluntary administrator of the subsidiary from calling on the approximately $19 million intercompany receivable that would otherwise have been available for its creditors – where sixteen factual issues posited by plaintiff in closing for determination – where "decisional issue" was whether defendant honestly and reasonable relied on legal advice – application dismissed **PRACTICE AND PROCEDURE** – undesirability of use of concise statements in cases of complexity
Legislation:	*Corporations Act 2001* (Cth) ss 180, 180(1), 180(2), 181(1)(a), 182, 187, 189
Cases cited:	*Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388 *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* [2023] FCA 1150 *Australian Securities and Investments Commission v LGSS Pty Ltd* [2024] FCA 587 *Australian Securities and Investments Commission v National Australia Bank Ltd (No 2)* [2023] FCA 1118 *Invisalign Australia Pty Ltd v SmileDirectClub LLC* [2024] FCAFC 46
Division:	General Division

Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	308
Date of hearing:	17–20 and 27 June 2024
Counsel for the Plaintiff:	P H Solomon KC with V Bell
Solicitor for the Plaintiff:	Johnson Winter Slattery
Counsel for the Defendant:	P Wallis KC with N Moncrief
Solicitor for the Defendant:	Holding Redlich

ORDERS

VID 605 of 2023

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**PAUL RYAN** Defendant

ORDER MADE BY: O'CALLAGHAN J

DATE OF ORDER: 6 NOVEMBER 2024

THE COURT ORDERS THAT:

1. The proceeding be dismissed.

2. The plaintiff pay the defendant's costs of the proceeding.

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

REASONS FOR JUDGMENT

O'CALLAGHAN J

INTRODUCTION

1 Dixon Advisory & Superannuation Services Pty Ltd (**DASS**) and E&P Operations Pty Ltd (**EPO**) were wholly owned subsidiaries of E&P Financial Group Ltd (**EP1**). EP1 and its subsidiaries formed part of a consolidated group (the **Group**).

2 EP1 listed on the ASX in May 2018, following what proved to be an ill-fated merger between Evans and Partners Pty Ltd (**EAP**), and EP1 (then named Laver Place Pty Ltd and the holding company for the group trading as "Dixon Advisory").

3 Mr Paul Ryan, the defendant, was a director of DASS from 30 March 2021; a director of EPO from 25 March 2020 until 5 July 2023; and Chief Financial Officer and Company Secretary of EP1 from 3 February 2020 until 24 November 2022. The other director of DASS was Mr Lyle Meaney.

4 DASS operated a financial advice business focused on retail clients (most of which were self- managed superannuation funds) and held an Australian Financial Services Licence (**AFSL**), a condition of which was that it maintained a net positive asset position. As an AFSL holder, DASS was required to lodge annual standalone audited general purpose financial reports with the Australian Securities and Investments Commission (**ASIC**).

5 DASS specialised in the provision of financial and investment advice, portfolio management and superannuation services, including the administration of self-managed superannuation funds. It was a revenue generating entity, which incurred only nominal direct expenses. That was because EPO provided various services to DASS — it employed DASS advisers and support staff, leased the offices from which DASS operated and owned and operated the technology systems used by DASS and other EP1 subsidiaries.

6 EPO "swept" cash from DASS from time to time, to fund the services it provided to DASS (and other entities in the Group). The movement of funds and liabilities as between EPO and DASS was recorded in an intercompany (running) loan account.

7 Historically, EPO charged a management fee equivalent to 90% of DASS's gross revenue for the provision of such services. It was recorded in the books of DASS as an expense, and its payment to EPO was usually recorded as a reduction in the balance of an intercompany loan account between EPO and DASS.

8 DASS's client revenues declined not long after the listing occurred, because it and the Group began to face scrutiny and complaints in respect of advice that DASS had provided to its clients recommending they invest in financial products offered by DASS, in particular in a fund called the US Masters Residential Property Fund (the **URF**). The URF was an ASX listed trust investing in the United States residential property market.

9 From 2020, DASS faced a number of claims relating to the provision of financial advice to clients who were advised to invest in the URF and related products, including a proceeding issued against it by ASIC, 90 complaints made by clients to the Australian Financial Complaints Authority (**AFCA**), and two class actions, with a potential liability in the vicinity of $500 million.

10 By the end of the 2021 financial year, DASS's revenue was in sharp decline. For the financial year ending 30 June 2021 its revenue was about $11 million, compared to about $16 million for the previous financial year, and about $20 million in the financial year ending 30 June 2019.

11 DASS held investment management insurance which covered liability for the AFCA complaints and legal costs in the ASIC proceeding referred to above up to $20 million.

12 In order to ensure that DASS maintained a net positive asset position, and did not breach a term of its AFSL licence, in about July 2021 EPO agreed to waive the management fee ordinarily charged to DASS for the financial year ending 30 June 2021, calculated in the sum of about $11.6 million. The waiver of the management fee meant that instead of the intercompany receivable being reduced by that amount, it remained at about $19 million.

13 On 21 December 2021, MinterEllison sent Mr Ryan a draft advice and a draft Deed of Acknowledgement of Debt (which I will refer to as the **deed** or the **DOAD**) in respect of the intercompany receivable between DASS and EPO. MinterEllison advised that the directors of DASS (including Mr Ryan) were justified and acting reasonably in taking the view that the execution of the deed was appropriate and in the best interests of DASS or EP1 or both, provided that the constitution of DASS was first amended specifically to authorise the directors of DASS to act in the best interests of EPO (its parent), pursuant to s 187 of the *Corporations Act 2001* (Cth) (the **Act**).

14 On 22 December 2021, the DASS Board of directors resolved to approve the revision to its constitution and to put it to EPO (DASS's sole shareholder) for approval and adoption.

15 On 24 December 2021, MinterEllison issued its final advice, confirming that the directors of DASS (including Mr Ryan) were justified and acting reasonably in taking the view that the execution of the deed was appropriate and in the best interests of DASS or EP1 or both.

16 The MinterEllison advice was founded on a number of assumptions, two of which are critical to ASIC's case, viz:

> [Clause 1.10] The parties agreed that the Intercompany Debt would accrue on the basis that repayment would only be required if and to the extent the Relevant Liabilities become payable by DASS and are not recoverable from insurance.
>
> …
>
> [Clause 1.12] The limitation of the purposes to which the proceeds of repayment of the Intercompany Debt may be applied, being the discharge, wholly or in part, of the Relevant Liabilities, formed part of the negotiations between DASS and [EPO] when the temporary suspension of the management fee ordinarily charged to DASS by [EPO] was put in place. The proposed Deed will acknowledge this.

17 As I explain below, ASIC contended that the evidence adduced at trial should persuade me that the parties did not in fact so "agree" and did not engage in such "negotiations"; that Mr Ryan knew assumptions to that effect were critical to MinterEllison's advice; that he knew or was wilfully blind to the fact that the parties did not so agree and did not engage in such negotiations; and that he did not discharge his duties in good faith in the best interests of DASS in breach of his statutory duties.

18 The DOAD was executed later that day. The effect of the DOAD in substance was that the balance of the intercompany loan in favour of DASS would only be repayable by EPO as and when the provisioned amounts in respect of the ASIC proceeding and AFCA claims became due and payable and only to the extent that insurance did not respond.

ASIC'S CASE

19 ASIC alleged that Mr Ryan contravened his statutory duties as a director of DASS under ss 180, 181(1)(a) and 182 of the Act and sought orders that he pay pecuniary penalties and be disqualified from managing corporations for (an unspecified) time. These reasons deal only with questions of liability.

20 I should say at the outset that ASIC did not allege that Mr Ryan was motivated by, or gained, any personal benefit or advantage by the conduct that ASIC sought to impugn. Nor was it alleged that DASS's creditors suffered any loss, in the events that occurred.

21 The gist of ASIC's case is that by voting in favour of certain resolutions between 22 and 24 December 2021, when DASS was "nearing insolvency", Mr Ryan, in his capacity as a director of DASS contravened ss 180, 181(1)(a) and 182, because the resolutions materially prejudiced its ability to pay its creditors.

22 The resolutions gave effect to two things:

(a) a change in DASS's constitution so as expressly to permit its directors to act in the best interests of EPO; and

(b) entry by DASS into the DOAD on 24 December 2021 between it and EPO (to the advantage of EPO and to the detriment of DASS).

23 By way of concise statement dated 3 August 2023, ASIC alleged that the resolutions materially prejudiced DASS's ability to pay its creditors, because the purpose and effect of the DOAD was to prevent a voluntary administrator of DASS from calling on the approximately $19 million intercompany receivable that would otherwise have been available for DASS's creditors. Instead, the DASS creditors (mainly its clients who had suffered large losses with their investments) were prevented from "avail[ing] themselves of the asset and any negotiating opportunity that [would have] presented to them".

24 By way of concise statement in response dated 28 September 2023, Mr Ryan said in substance that:

(1) in passing the resolutions, he sought, obtained and relied upon written legal advice from MinterEllison that was provided in final form on 24 December 2021 to the effect that DASS's constitution should be amended to expressly authorise the directors of DASS to act in the interests of DASS's holding company and that, as a director of DASS, he was justified and acting reasonably in taking the view that the execution of the DOAD was appropriate and in the best interests of DASS or EP1 or both;

(2) he exercised the degree of care and diligence that a reasonable person in his position as a director of a company in DASS's circumstances within the EP1 Group would have exercised;

(3) the decision to amend the DASS constitution and the decision to execute the deed were business judgments within the meaning of s 180(2) of the Act;

(4) he exercised his powers and discharged his duties in good faith and in the best interests of DASS;

(5) he did not improperly use his position to gain an advantage for EPO, nor to cause detriment to DASS;

(6) he acted in the interests of DASS as a whole, considering and appropriately weighing the interests of DASS's creditors as part of a holistic assessment and did not act contrary to the interests of creditors;

(7) it was for the shareholder of DASS, EPO, to determine whether to amend its constitution, not for the directors of DASS.

25 Mr P Wallis KC, who appeared with Ms N Moncrieff of counsel for Mr Ryan, put the defendant's case succinctly in his closing address in this way:

> … a proper characterisation of what Mr Ryan did was seek, responsibly, advice from trusted and experienced lawyers as to how to handle the situation. And the advice, properly read from the perspective of a layperson … said in substance, it is permissible for EPO to amend the constitution of DASS to include that provision, and it's permissible for you, then, to rely upon it in respect of executing the deed. So that's what he did.
>
> Now, we ask the question, how can that be a breach of any obligation under the Corporations Act as a director when he is acting entirely consistently with the legislative framework that has been laid out. We say the answer is, he can't be.

26 Mr Ryan also submitted that s 181 was not enlivened in relation to his conduct as a director of EPO in resolving to approve the revised DASS constitution. (That said, I do not read the concise statement as making any allegation that Mr Ryan breached his duties as a director of EPO).

27 ASIC's reply was as follows:

In reply to the defendant's concise statement in response filed 28 September 2023 (Response), the plaintiff:

1 Joins issue.

2 Says further as follows, in response to the allegations made in paragraphs 2(g) and 2(h):

(a) The written advice from Minter Ellison there set out (**ME Advice**) recorded (at [1.1]) that: "Our understanding and instructions regarding the relevant background facts are set out below. Our opinion below is based on the accuracy of the background stated, which we have not independently tested or verified";

(b) To the knowledge of Ryan:

(i) the background fact or circumstance set out in the last sentence of [1.10] was not accurate;

(ii) the background fact or circumstance set out in the first sentence of [1.12] was not accurate;

(c) in these premises:

(i) Ryan did not in fact rely on the ME Advice;

(ii) further or alternatively, any reliance by Ryan on the ME Advice (including for the purposes of s 189 of the Corporations Act):

(A) was not reasonable;

(B) was not in good faith;

(C) did not justify Ryan to hold a view that execution of the Deed (as defined in the Response) was appropriate and/or in the best interests of DASS or EP1 (each as defined in the Response) or both.

28 In its closing written submissions, ASIC contended that "[a]s a director of two corporations … Mr Ryan owed duties to each of DASS and [EPO], and to both of them, including to manage conflicts of duty and duty as between their respective interests", but added that whether s 181 of the Act is here engaged in relation to Mr Ryan's conduct in passing the EPO resolution "is not of particular moment".

29 In ASIC's written opening submission, it was made clear that the question of whether Mr Ryan had honestly and reasonably relied on the MinterEllison advice was "in all likelihood, the determinative issue":

> Centrally to the case at trial, and singularly relevant when he gives evidence, Ryan has foreshadowed that he will rely on written advice provided by MinterEllison. MinterEllison provided final written advice on 24 December 2021. That reliance, when it occurs, will then engage the factual issues of knowledge pleaded in ASIC's Reply. Further and moreover, insofar as Ryan relies upon the final MinterEllison advice, in relation to his conduct (qua director) concerning amendments of the DASS Constitution (on 22 December 2021) he necessarily must also be relying on earlier iterations of the advice (that is, on earlier drafts of that advice).
>
> There is no objection by Ryan to ASIC tendering all of the documents nominated in its case in chief; and in its reply (save for a reservation on transcripts of compulsory ASIC interviews). **In all likelihood, the determinative issue at the trial of the matter will be the reasonableness of the reliance by Ryan, on the written advice of MinterEllison**.

(Emphasis added.)

30 In his written closing submissions, Mr P H Solomon KC, who appeared with Ms V Bell of counsel for ASIC, said that its "first case" was "the case that most starkly corresponds to the facts and circumstances in play", namely that by causing DASS to amend its constitution so as to afford the directors of DASS statutory protection when causing DASS to enter into the DOAD; and/or causing DASS to enter into the DOAD, Mr Ryan breached his duty to exercise his powers and discharge his duties in good faith in the best interests of DASS within the meaning of s 181(1)(a) of the Act.

31 Mr Solomon also submitted that Mr Ryan preferred his own interests in taking steps to entrench the constitutional amendment for his own protection in the events in immediate contemplation, but the point was not addressed in the concise statement or the reply and Mr Ryan rightly objected to a new case being made in opening. I accordingly decline to deal with it.

32 ASIC submitted that "neither the constitutional amendment, nor the entry into the DOAD itself (and, *a fortiori*, not the constitutional amendment for the purpose of protecting the directors in entering into the DOAD) was in the interests of DASS" and that "[n]o reasonable director in Mr Ryan's position could have thought it was".

33 The second and third ways ASIC put its case were that Mr Ryan failed to exercise the requisite degree of care and diligence required by s 180(1) of the Act because he failed to exercise the requisite degree of care and diligence when assessing the effect of the constitutional amendment and/or the DOAD on DASS's creditors; and that he improperly used his position as a director of DASS to gain an advantage for EPO within the meaning of s 182 of the Act.

34 In its written opening submission, ASIC submitted that he improperly used his position to gain advantage for the Group, not just EPO. Again, that point was not addressed in the concise statement or the reply and Mr Ryan objected to a new case being made in opening. I accordingly decline to deal with it.

35 In his opening address, senior counsel for ASIC summarised the three critical issues raised by its case as follows:

> Let me tell you what we expect the case will be about. It will be about three things. I'm intending now to summarise the essence of the case accurately. These are the three things that it's about. One thing is to understand what agreement or understanding was reached between these two entities through individuals in July, August and/or September. Mr Ryan and Mr Anderson have both given their sworn evidence on that, and we will test it in cross-examination. The second central feature of the case, which is about the acts and omissions of a director, is what reliance, in fact and/or reasonably, was placed on legal advice by MinterEllison and guidance by the group's CEO, Mr Anderson. **My expectation is that will be the decisional issue**. MinterEllison gave advice. What reliance, in fact and/or truth, did Mr Ryan place on it?
>
> HIS HONOUR: Yes.
>
> MR SOLOMON: Thirdly, it appears from Mr Ryan's evidence that he contends that this deed was in the interests of DASS, whether or not there was an earlier agreement or understanding.
>
> HIS HONOUR: Yes.
>
> MR SOLOMON: So that's the essence of the case: the agreement or understanding Mr Ryan relies upon from July, August, and or September; the reliance on legal advice and, further, Mr Anderson in advance of the resolution in December; and the circumstance as to whether, in any event, the interests of the company were served by entering – of DASS were served by entering into this deed. There's an associated question which concerns a resolution to amend the constitution, two days earlier, which we will deal with in the evidence.

(Emphasis added.)

36 By the time of ASIC's closing address, those three issues had turned into sixteen which, it was submitted, would determine the outcome of the proceeding. As senior counsel put it:

> We think, and I expect this to be uncontroversial, that the essence of this case concerns the findings your Honour makes on various controversial factual matters. That might be true of most trials, but there's a lot of cases that have been – that your Honour has been referred to. I'm speaking for myself. I've had the pleasure of reading each of them over the last four weeks. And law is interesting on aspects of 180 and 181 and 182 and 187 and 189. But as a submission, we invite your Honour, if your Honour considers them potentially relevant, to treat our 16 factual findings as the factual issues. They are not agreed. There are factual issues, and we think at the end of that, it's likely to fall out what the legal conclusion then will be.

37 Neither party took me in any detail in oral closing addresses to the sections of the Act relied on, and closing submissions proceeded on the basis contended for by senior counsel for ASIC – that is, that resolution of the sixteen factual questions, one way or the other, would determine the outcome of the proceeding.

38 It was not, and is not, clear to me how a number of the questions were said to arise from the "pleaded" case, but counsel for Mr Ryan voiced no objection to me dealing with them seriatim, or with the proposition that the answers to the questions inherent in ASIC's proposed factual findings would be determinative of the outcome. So I proceed accordingly.

39 For the reasons that follow, I conclude (among other things) that:

(1) Mr Ryan did in fact rely on the MinterEllison advice;

(2) clauses 1.10 and 1.12 of the MinterEllison advice were not materially inaccurate;

(3) Mr Ryan's reliance was reasonable and in good faith and it did justify him holding the view, as he did, that the execution of the DOAD was appropriate and in the best interests of DASS;

(4) ASIC has therefore not established that Mr Ryan contravened ss 180, 181(1)(a) or 182 of the Act in his capacity as a director of DASS; and

(5) the proceeding is to be dismissed.

THE EVIDENCE RELIED ON

40 ASIC read three affidavits of Melisande Guanlao, an Investigator in ASIC's Enforcement & Compliance team, one made 15 February and two made 15 May 2024, and (with some exceptions) tendered the bundles of documents referred to in those affidavits.

41 Mr Ryan read the affidavits of:

(a) himself made 26 April 2024;

(b) Mr Stephen Hill (who was at the relevant times Group Financial Controller and then Deputy Chief Financial Officer of EP1) made 26 April 2024;

(c) Mr Peter Anderson (who was at the relevant times the Chief Executive Officer and Managing Director of EP1) made 26 April 2024; and

(d) Mr David Evans (Chairman of the EP1 Board) made 26 April 2024.

42 ASIC correctly summarised the substance of Mr Ryan's evidence in its written opening submission as follows:

> (a) from around October 2020, the Group began to plan for various contingencies, including the possibility of DASS having to be placed into voluntary administration;
>
> (b) the Group's contingency planning was known as "Project Fork", of which Mr Ryan was a member along with Mr Francis Araullo and Mr Marc Falkiner;
>
> (c) from September 2020, restructuring and insolvency firm McGrathNicol was intimately involved in all aspects of Project Fork;
>
> (d) from October 2020, MinterEllison provided legal advice with respect to the Project Fork contingency planning;
>
> (e) at some point between late October 2020 and late March 2021, he had a conversation with Mr Anderson in which Mr Anderson said to him that the intercompany loans in favour of DASS was one of the Group's biggest risks if it ever became necessary to place DASS into voluntary administration and that they needed to manage those risks by reducing the balance of the loans as much as possible by the end of FY2021;
>
> (f) on his instruction, in late May and early June 2021, the finance team "started the process of reducing the balances of the intercompany receivables involving DASS";
>
> (g) in or around late July or early August 2021, he had a discussion with Mr Hill in which one of them said that the only available lever they had to ensure that DASS remained in a net positive asset position was for EPO to waive the management fee for the 2021 financial year. He instructed Mr Hill to waive the management fee and prepare the DASS financial accounts accordingly;
>
> (h) shortly after the discussion with Mr Hill, he (Mr Ryan) had a conversation with Mr Anderson in which he told Mr Anderson that it was necessary for EPO to waive the management fee such that the balance of the intercompany receivable in favour of DASS would increase, not be reduced;
>
> (i) during a conference call with McGrathNicol, MinterEllison and the Project Fork team on 8 November 2021, he said that DASS should not be permitted to call on the intercompany receivable unless and until a claim had actually crystallised and it was not covered by insurance;
>
> (j) in early December 2021, the likelihood of a decision to appoint voluntary administrators to DASS was increasing;
>
> (k) on 20 December 2021, Messrs Anderson, Falkiner and Ryan met with Mr Stephen Longley of PwC to discuss the potential appointment of a voluntary administrator to DASS;
>
> (l) he relied on the fact that Mr Hill did not identify any errors in the Background section of the DOAD;
>
> (m) he was mindful that DASS's creditors were all current or former clients of DASS and that the current clients were dependent on the ongoing support of EPO and the Group if they were to continue to receive investment advice services from the Group; and
>
> (n) he took into account that Mr Anderson had stated to him and the EP1 Board that he intended to ensure that the Group contributed an amount that was approximately the same as (and potentially more than) the balance of the intercompany receivable in favour of DASS at the time to any Deed of Company Arrangement (**DOCA**).

43 ASIC correctly summarised the substance of Mr Anderson's evidence in its written opening submission as follows:

> (a) he commenced as a non-executive director of EP1 in April 2019 and as the CEO of EP1 on 8 July 2019;
>
> (b) as a result of the commencement of litigation against DASS, he decided it was prudent for the Group to obtain independent advice from McGrathNicol as to the steps that might need to be taken if the worst-case

scenario came to pass;

(c) he and Mr Ryan met with Mr Rob Smith and Mr Andrew Wharton of McGrathNicol in about mid-September 2020;

(d) in March 2021, he had a conversation with Mr Ryan in which he stated that "the intercompany loans in favour of DASS were the Group's biggest risk in a potential voluntary administration and DOCA and that we needed to manage those risks by reducing the balance of the loan so that the Group was not exposed";

(e) in early September 2021, Mr Ryan told him that EPO had waived the management fee that it would ordinarily have charged DASS for FY2021 so as to ensure that there was a sufficiently high balance of the intercompany receivable between DASS and EPO in DASS's favour for DASS to maintain positive net assets as required for its AFSL; and

(f) he (Mr Anderson) said that there was no scenario in which the Group would agree to put cash into DASS to cover the AFCA claims and that Mr Ryan needed to document the arrangement.

44 ASIC correctly summarised the substance of Mr Hill's evidence in its written opening submission as follows:

(a) at some point in July 2021, he realised that, as a result of the methodology for calculating AFCA provisions, DASS would have negative net assets if EPO charged its management fee to DASS in the usual way;

(b) at around this time, the finance team realised that the only available way to keep DASS in a positive net asset position was for EPO to waive its management fee to DASS for FY2021;

(c) it was for that reason that the management fee for FY2021 was waived;

(d) by September 2021, he "understood that [EPO] and DASS had agreed (as per practices that had already been established) that [EPO] would repay the intercompany receivable as and when the mounting provisions that were recorded as liabilities on DASS's balance sheet crystallised or actually became due and payable".

45 Mr Ryan also relied on an expert report from Mr Sebastian Hams of KordaMentha dated 29 April 2024. His evidence was that, on the assumptions instructed to him, DASS was solvent on and at all times from FY19 to 24 December 2019.

46 Mr Evans' evidence was not in the end relied on, at least for anything that mattered.

47 Messrs Ryan, Hill, Anderson and Hams were cross-examined.

THE FACTS

September 2020

48 Prior to the merger of Evans and Partners and Dixon Advisory, in around June 2011 Dixon Advisory established the URF, a unit trust and registered management investment scheme. The primary strategy of the URF was investing in the New York and New Jersey residential property market. Upon its establishment, DASS was the investment manager and responsible entity of the URF. On 23 July 2012, the URF was listed on the ASX.

49 From 2020, DASS became the subject of myriad litigation relating to provision of financial advice to clients who were advised to invest in the URF and related products, including a proceeding issued by ASIC on 4 September 2020 in the Federal Court (**ASIC proceeding**); over 90 complaints made by its clients to AFCA; and two separate Federal Court class action proceedings.

50 After the filing of the ASIC proceeding in September 2020, the Group engaged Messrs Robert Smith and Andrew Wharton at McGrathNicol, to assist it with what was called "contingency planning".

51 The contingency planning project came to be known as "Project Fork".

52 The scope of the project included "consider[ing] risks and contingency options for DASS in the event of a material adverse outcome from ASIC's actions, including a Scheme of Arrangement or insolvency process".

53 The Project Fork team within the Group comprised Mr Ryan, Mr Araullo (then Executive Director – Risk & Compliance) and Mr Falkiner (then Executive Director, Strategy & Operations (E&P Wealth)), with oversight from Mr Anderson.

54 From the time of its engagement in September 2020, it was Mr Ryan's role to ensure that McGrathNicol was provided with access to all financial information of the Group that they requested. Mr Ryan worked closely with McGrathNicol, as did Mr Anderson and the senior management of the Group. Mr Ryan deposed that he did not have any experience in corporate restructuring or insolvency, and that he relied on Mr Anderson and McGrathNicol to provide him with guidance as to how to proceed towards a potential voluntary administration of DASS.

55 Mr Ryan also deposed as to the following about Mr Bart Oude-Vrielink:

> From around July 2019, Bart Oude-Vrielink of MinterEllison provided advice to EP1, DASS and the Group in respect of regulatory and general corporate legal issues. Mr Oude-Vrielink has been David Evans' go-to lawyer at least as far back as the formation of EAP in 2007 and was EAP's preferred external legal advisor until the merger in 2017. He was utilised far less while Alan Dixon was in charge of EP1 but was progressively reinstated upon Mr Anderson's appointment as CEO in mid-2019. I knew Mr Oude-Vrielink to be one [of] Australia's pre-eminent corporate law and capital markets lawyers. In October 2020, MinterEllison was first requested to provide advice in connection with Project Fork. From that point, MinterEllison provided legal advice with respect to the Project Fork contingency planning through to the voluntary administration of DASS. Various requests for advice were made between October 2020 and December 2021 regarding the position of DASS. MinterEllison, specifically Mr Oude-Vrielink, was familiar with issues facing the Group and DASS and a trusted advisor to the Group and I also relied on him to provide me with guidance as to how to proceed towards a potential voluntary administration of DASS.

October 2020

56 On 20 October 2020, McGrathNicol provided a draft Project Fork contingency plan report to EPO and its associated entities.

57 The report confirmed that the scope of the work was to review assets, operations and contractual rights and obligations of DASS; to review the Group structure and understand the relationships and inter-dependencies between DASS and other Group entities, to consider risks and contingency options for DASS in the event of a material adverse outcome from ASIC's actions, including a scheme of arrangement or insolvency process; and prepare a contingency planning document for review by the Board of ED1 (as the parent company was then called) and management.

58 Among other things, the draft report noted that DASS had net related party loans of $11.7 million, comprising a $16.2 million receivable by DASS and $4.5 million payable by DASS (including $3.3 million intercompany tax loans). It recorded that "loans receivable and payable by DASS from other group entities are undocumented and non-interest bearing".

59 Part of the report dealt with its "key objectives" as follows:

> We have set out below our understanding of the Group's prioritised objectives when navigating through the process of defending ASIC proceedings, AFCA investigations and any potential client class action ("DASS Claims"). It is paramount that any material financial or other consequences are

'ringfenced' to DASS to the fullest extent possible, and that the ED Group is protected from any financial, reputation and regulatory risks (in order of importance).

…

CRITICAL

Protect Evans Dixon Group from any fallout from DASS Claims

C1: Financial

- Ringfence any DASS penalties and investor remediation costs to DASS entity and prevent contagion or claims on the broader group.

60 Part 3.5 of the report was headed "3 DASS – 3.5 Clients" and read, relevantly:

> All DASS client agreements are with [EPO], with T&Cs and invoice references to DASS and other FWM [Family Wealth Management] entities providing relevant services. This gives rise to two key issues, being (in order of importance) (i) potential risk of DASS Claims attaching to [EPO] (major operating and holding entity of FWM, Walsh and Fort Street businesses) or other FWM entities (DAS, DAP and Clear Law Pty Ltd), and (ii) potential complexity in the process to transfer DASS clients to another ED Group entity. Minter Ellison is preparing relevant advice for the Group which we understand will be completed after our report is issued.

61 Part 3.6 dealt with related party loans (**RP loans**), and contained this recommendation:

> **Recommendation: We recommend Management investigate all potential means as appropriate to reduce the quantum RP loans receivable by DASS in the event of a future VA** [voluntary administration]**. This may include tax related entries or other entries which create contra balances with the relevant group entities.**
>
> (Emphasis in the original.)

62 Part 4.3 of the report was headed "DASS contingency options – Scenarios which may lead to Tipping Point", and said relevantly:

> At this early stage, it is not possible to map out all the events which may unfold in ASIC and AFCA's proceedings and investigations against DASS. We have outlined a number of scenarios below which may lead to a "Tipping Point" where the expected total quantum of fines, remediation costs and legal costs exceed DASS' capacity to pay or the Group's willingness to fund. At this juncture, we recommend Management discuss with ASIC a negotiated solution which involves a fixed sum of DASS / ED Group funds being contributed to a SoA [scheme of arrangement] in resolution of all ASIC and investor claims.
>
> We expect that at some point during the DASS Claims processes (i) Management and the Board will have visibility regarding the expected quantum of total fines, remediation costs and legal costs, and (ii) the total amount will exceed DASS' capacity to pay and the Group's willingness to fund (referred to opposite as [$Xm]).
>
> We have labelled this the "Tipping Point", being the time when Management should approach ASIC regarding a negotiated settlement via SoA and used [sic] this as the starting point for a DASS

> Event [defined as a scheme of arrangement or voluntary administration] in our indicative roadmap in section 4.4.

63 Shortly after he received the first draft Project Fork report, Mr Ryan deposed that he read and discussed it with Mr Anderson.

64 Mr Ryan said that he did not recall the content of his discussion at that time with Mr Anderson, including whether they discussed McGrathNicol's recommendation with respect to DASS's intercompany receivables. Mr Ryan deposed, however, that at some point between late October 2020 and late March 2021, when the Group received the final version of the Project Fork report, he had a discussion with Mr Anderson in which Mr Anderson said that the intercompany receivables in favour of DASS were one of the Group's "biggest risks" if it ever became necessary to place DASS into voluntary administration, and said that the Group needed to manage those risks by reducing the balance of the intercompany loans as much as possible by the end of FY2021.

February 2021

65 In mid-February 2021, McGrathNicol distributed to Messrs Ryan, Anderson and Hill, among others, a further version of the draft Project Fork contingency planning report dated 16 February 2021.

66 It included a new section summarising the key risks and recommendations relating to EPO in the event that the DASS claims were pursued against EPO as the key operating, employing and asset holding entity.

March 2021

67 Mr Ryan was appointed a director of DASS on 30 March 2021.

68 A day later, McGrathNicol provided a further draft of its Project Fork report to Mr Ryan and others for their review and comment.

69 It incorporated advice received from MinterEllison in February 2021 and included a "Key Takeaways" section. This section identified that the "the most significant risks to [the Group] relate to (i) client T&Cs [terms and conditions] and invoices due to [EPO] being the contracting counterparty with clients, and (ii) net related party receivables in DASS of $11.7m which represent liabilities for the rest of the Group."

70 Around that time, Mr Ryan deposed that he instructed his finance team to look into options to reduce DASS's intercompany balances in accordance with McGrathNicol's recommendation.

May/June 2021

71 In late May and early June 2021, as Mr Ryan deposed, "the finance team, led by Mr Hill with assistance from Mr [Mugu] Selvaratnam [the Group Financial Controller] and Ms [Linh] Vo [Financial Accountant], started the process of reducing the balances of the intercompany receivables involving DASS".

72 On 31 May 2021, Mr Ryan deposed that he received letters of determination advising that the relevant insurers would provide insurance coverage to the Group and DASS as follows:

> (a) Defence costs for the ASIC proceeding would be covered, with a limit of liability of $20,000,000, and a deductible of $250,000 (insurance did not cover against fines or penalties).
>
> (b) Some of the then existing AFCA claims would be covered. The covered claims were aggregated with the defence costs for the ASIC proceeding. Accordingly, there was a limit of liability of $20,000,000 and a deductible of $250,000.

73 Mr Ryan deposed that he "thereafter proceeded on the basis that DASS was insured against both defence costs and any settlements in relation to the eligible AFCA complaints, with the exception of those settlements resulting from excessive fees being charged".

74 Mr Ryan further deposed that "[f]rom the outset, the Group … funded the legal costs incurred on behalf of DASS and sought to settle any complaints in respect of which AFCA issued a preliminary determination in favour of the claimant, with the Group also funding the compensation paid to the claimant. These amounts were paid by EPO and recorded in the intercompany receivable between DASS and EPO (as a reduction in the balance in favour of DASS)".

75 Following the insurance determination, any reimbursement payments made by the insurer were received by EPO and recorded in the intercompany receivable between DASS and EPO.

76 To the extent that there were no reimbursements, or the amount of the reimbursement was less than the amount expended in respect of an AFCA claim, the Group bore those costs.

77 As Mr Ryan further deposed, "[t]he Group subsequently adopted a corresponding approach with respect to other proceedings issued against DASS, including with respect to all legal and associated costs of the proceedings, including the ASIC Proceeding".

78 In relation to the ASIC proceeding, Mr Ryan deposed as follows:

> … The Federal Court had set a date for a mediation of 28 June 2021. In the lead up to the mediation, I had several discussions with Mr Anderson in which we discussed the commercial terms on which DASS might consider settling the ASIC Proceeding, and the extent to which EP1 would support the payment of any agreed penalty. In our discussions, Mr Anderson said that he considered it to be in EP1's and DASS' interests to achieve an agreed outcome in the ASIC Proceeding and that he thought ASIC might agree to a settlement by which DASS admitted a limited number of contraventions and agreed to pay a penalty and legal costs of up to $10 million. Mr Anderson said that EP1 would need to support DASS up to this amount. Mr Anderson asked me to review the Group's cash position and to report back to him whether the Group had sufficient cash to pay a penalty of up to $10 million.

79 Mr Ryan attended an EP1 Board meeting held on 24 June 2021. He provided the Board with an update on EP1's financial position (including as to EP1's cash position) if the settlement of the ASIC proceeding involved the payment of $10 million. As the minutes record, he explained that, in relation to the ASIC Proceeding:

> … management had considered the Group's ability to pay a penalty in respect of any admissions in the context of its profitability and cash position. Mr Ryan noted that based on the FY22 Budget and FY23 Forecast, if the company were to provide financial support to DASS up to the proposed Maximum Amount of $10m, the cash buffer over and above the group's regulatory and bank guarantee facility requirements would decline to $5-10m during October/November 2021, being the seasonal working capital low point following payment of annual staff bonuses and associated tax.

80 At that meeting the Board resolved to provide DASS whatever financial support in a form to be agreed considered reasonably necessary to ensure that DASS would have the financial capacity to pay the ASIC penalty and costs and remain able to pay its debts. The Board's resolution was in these terms:

> EP1 will provide to DASS whatever financial support (in such form as the Directors and the DASS directors agree) that the DASS directors consider reasonably necessary to ensure that DASS will have the financial capacity to pay the Maximum Amount and remain, after the payment, able to pay its debts as and when they become due and payable and in compliance with the financial conditions of its Australian financial services licence.

81 On 30 June 2021, the EP1 Board "confirm[ed] the operation and efficacy" of that resolution and notified the DASS Board accordingly.

82 By 30 June 2021, the finance team had reduced the balances of all of the intercompany receivables involving DASS to zero (or close to it), other than the intercompany receivable between DASS and EPO.

July 2021

83 On 8 July 2021, ASIC and DASS signed a heads of agreement to settle the ASIC proceeding in which it was agreed, among other things, that DASS would pay a pecuniary penalty of $7.2 million to the Commonwealth and ASIC's costs of the investigation and proceeding agreed at $1 million.

84 At around the same time, Mr Ryan spoke with Mr Anderson. Mr Anderson told him "that he had been considering the total amount of money that the Group would likely have to contribute in order to finally dispose of all claims against DASS in relation to URF, including the potential class actions" and that "he considered that the Group would need to contribute the $8.2 million in respect of the ASIC proceeding, as well as all of the balance of the available insurance and around another $10 million that would be needed to convince the DASS claimants to agree to enter into a holistic remediation scheme, or other structure such as a deed of company arrangement … that resolved all claims against DASS".

85 Mr Ryan deposed that "[f]rom that point on, I proceeded on the basis that the Group would likely make these sums available to resolve the claims against DASS".

86 In early July 2021, the finance team began preparing the financial accounts for the Group for FY2021. Mr Ryan deposed that:

> Given the settlement of the ASIC Proceeding (which was still subject to Court approval), it was necessary to record a provision of $8.2 million as a liability in the balance sheet of DASS (and therefore also the Group). Under relevant accounting standards, the threshold for recognising a provision was: (i) an entity had a present obligation (legal or constructive) as a result of a past event, (ii) it was probable that an outflow of resources would be required to settle the obligation, and (iii) a reliable estimate could be made of the amount of the obligation. The finance team also engaged in substantial and detailed work to seek to calculate the appropriate amount to be recorded as a provision in respect of the AFCA claims against DASS. Given that by this time AFCA was calculating some (but not all) of the amounts of compensation to be paid to claimants on a "whole of portfolio" approach, the calculations were complicated but resulted in a provision of approximately $7.8 million.
>
> The fact that insurance was responding to the claims meant that there was also an insurance receivable that could be recorded as an asset in the balance sheet of DASS (and therefore also the Group). However, under relevant accounting standards, there was a higher threshold of likelihood to be applied before an insurance receivable asset could be recognised — receipt of the insurance needed to be "virtually certain" — and this could only be met where DASS had received written confirmation from the Insurers that insurance would respond to the relevant claim.
>
> Given that it took time for the Insurers to provide this confirmation, these requirements resulted in a mismatch in timing between recognition of the provision liabililty [sic] and the insurance receivable asset, in which the provision was much larger than the insurance receivable, even though it was likely that insurance would ultimately respond to most, if not all, of the AFCA claims.

Late July/August 2021

87 On 23 July 2021 Mr Selvaratnam emailed to Mr Hill a draft memorandum entitled "E&P Financial Group Limited Management Fees Methodology – AFSL entities". Mr Selvaratnam stated that he had "updated the memo to reflect DASS' loss making position due to the regulatory proceedings and related costs, as such management have decided to waive the fees in FY21 and unwind the 1H21 management fees as well". Relevantly, the draft memorandum recorded the following:

> The purpose of this memorandum is to provide guidance on the calculation of management fees to [EPO] from the five AFSL entities [which included DASS] that have been in the E&P Financial group ("E&P") for financial year.
>
> For ease of accounting and administration purposes, a number of expenses indirectly relating to [DASS] are booked directly to [EPO] at source. However, the revenues associated with each entity are recognised in the company where the revenue is sourced.
>
> …
>
> Therefore, in order to rectify this mismatch between revenue and expense in the P&L of [DASS] … it is necessary to charge [it] a management fee to more accurately portray the true position of the entity's financial position/performance in the financial statements.
>
> It should also be noted that the management fee is calculated and charged every six months at the end of each reporting period December and June … a management fee is only charged to an extent that would not jeopardise the ability … of [DASS] to pass [its] AFSL/ASX financial requirements as per [its] AFS license[].

88 The calculation of the management fee for DASS was detailed in the draft memorandum as follows:

> **1. DASS:** The significant direct expenses booked at source which relate to DASS include AAM Equities/Contract note expenses, IRESS charges, investment advisory and professional fees and client rebates. In general terms, DASS is the entity within the group which provides the financial and investment advisory services to clients within the group, and the direct costs above are minimal compared to the overall costs required for the entity to operate if it were a standalone entity.
>
> Therefore, in order to estimate the remaining, indirect and overhead costs of business in relation to DASS (which are processed and booked in [EPO]), a fee equivalent to 90% of the gross revenue booked by DASS is charged by [EPO] to DASS as a management fee. However, during the current period DASS's direct expenses increased significantly due to regulatory proceedings and related costs (ASIC penalty $7.2M, ASIC costs $1.0M, AFCA Provision $2.5M, Legal costs $3.1M). **As a result, DASS is currently in a loss position and management has decided to waive the management fee for FY21.**
>
> (Emphasis added.)

89 Consistently with the terms of the draft memorandum, Mr Ryan deposed that by late July or August 2021, "the finance team had done sufficient work to calculate that DASS would need to recognise provisions as liabilities in respect of the ASIC proceeding and AFCA claims which ultimately totalled $16 million whilst an insurance receivable asset of only approximately $5.5 million could be recognised in the FY2021 accounts. The recognition of such large liabilities in DASS's balance sheet raised the prospect that DASS would not be able to maintain a net positive asset position if EPO charged the Management Fee for FY2021, in accordance with its usual practice".

90 Mr Ryan continued:

> At around this time, I had a discussion with Mr Hill in which one of us (I do not recall who) said that the only available lever that we had to ensure that DASS remained in a net positive asset position was for EPO to waive the Management Fee for FY2021, so that the intercompany receivable would not be reduced by the amount of the Management Fee, with the result that the balance of the intercompany receivable would remain high enough to offset the provisions and other liabilities of DASS. I could not think of any other alternative to this course so I decided that

> the Group would follow this course and instructed Mr Hill to waive the Management Fee and prepare the DASS accounts accordingly.
>
> I recognised that the decision that EPO would waive the Management Fee would have the opposite effect of what Mr Anderson had asked me to do in around March 2021, namely to seek to reduce the balance of the intercompany receivable in DASS's favour as much as possible. However, I considered that the Group had no other alternative if it wanted to keep DASS in a positive net asset position in light of the provisions that had to be recognised. The need to recognise the provisions also foreclosed for the time being any other possible available means of reducing the balance of the intercompany receivable, such as having DASS declare dividends or agree to forgive the intercompany receivable.

91 Throughout August 2021, Mr Ryan and the finance team were busy finalising the Group's consolidated financial statements, which were authorised by the directors of EP1 for issue on 24 August 2021.

92 Mr Selvaratnam and Mr Hill worked with the Group's auditor, Deloitte, to respond to all requests required to satisfy the Group's audit requirements. In relation to the management fees charged by EPO to all AFSL entities in the Group, there had been a practice across previous financial years of preparing a memorandum to address the fee which would be charged to each entity. Following the decision to waive the management fee for FY2021, Deloitte requested that the memorandum be updated to reflect the reasons for that decision.

93 On 10 August 2021, Mr Selvaratnam emailed to Ms Joanna Rolland at Deloitte (copying Mr Hill) an updated memorandum (which was relevantly in the same terms as the previous draft sent internally on 23 July 2024 to Mr Hill, in so far as it related to DASS).

94 On 18 August 2021, Piper Alderman wrote to DASS and EP1 stating that it had been instructed to prepare a class action claim against those companies and their directors and/or officers relating to advice provided to clients of DASS to invest in the URF and related products.

95 On 26 August 2021, Mr Ryan received an email from Mr Selvaratnam attaching a first draft of the FY2021 DASS financial statements. In his email, Mr Selvaratnam noted that there was a "nil management fee expense in FY21 (FY20 $16M) due to the increase in expenses relating to the ASIC & AFCA provision". The draft financial statements recorded "Consulting and professional fees" as $0, and a related party receivable of approximately $19 million. Mr Ryan provided comments on this draft statement.

96 Mr Ryan deposed that the increasing provisions arising from the settlement of the ASIC proceeding and the adoption of the "whole of portfolio" approach by AFCA to assess loss of claimants, the proportion of insurance moneys being consumed by the various claims against DASS and the renewed threat of an imminent class action prompted him and Mr Anderson to devote more time to advancing Project Fork from late August and early September 2021.

97 On 31 August 2021, Mr Anderson told Mr Ryan that he intended to call Mr Smith to engage McGrathNicol to prepare a report on the solvency of DASS and the triggers that might lead to DASS becoming insolvent.

98 Later that day, Mr Ryan was copied to an email that Mr Anderson sent to Mr Smith in which he requested Mr Smith to prepare a report on the solvency of DASS.

September 2021

99 On 1 September 2021, a Project Fork team workshop was held over Zoom. The meeting was attended by Messrs Ryan, Anderson, Falkiner, Araullo and Meaney, as well as Messrs Smith and Wharton of McGrathNicol. At the meeting, so Mr Ryan deposed, they "discussed and sought to decide on what external advice and services would be required to progress through the next stages of contingency planning".

100 By letter dated 1 September 2021 addressed to Mr Anderson, McGrathNicol confirmed the terms of its additional or new scope of work in these terms:

> **Background and scope**
>
> The scope of our work will be to:
>
> 1. prepare a report for Directors (DASS and EP1) (the "Report") that addresses:
>
> – solvency considerations of DASS and key decision points;
>
> – DASS potential financial exposures (contingent or actual) including quantification, crystallisation, mitigations and triggers;
>
> – explanation of the Safe Harbour regime;
>
> – options and other considerations for Directors; and
>
> 2. prepare, project manage and iterate a contingency implementation plan through to project completion in response to the potential exposures in DASS (the "Contingency Plan").
>
> Our work will require us to liaise regularly and work collaboratively with EP1 management including Peter Anderson (CEO), Paul Ryan (CFO) and EP1's legal advisors Minter Ellison.
>
> **Reporting**
>
> At the completion of scope item 1, EP1 will receive the Report as outlined above for review by EP1 and DASS's Board and management. A draft of the Report will be forwarded to you for review and comment prior to being finalised. In respect of scope item 2, we will prepare the Contingency Plan, which we will then project manage and iterate over implementation of the plan.

101 Mr Ryan signed this engagement letter on behalf of the Group on 2 September 2021.

102 On the same day, Mr Ryan received an email from Mr Selvaratnam attaching a further draft of the DASS financial statements, together with a proposed note for the accounts to explain the management fee waiver.

103 The proposed note, with which Mr Ryan agreed, read: "Consulting and professional fees charged by the parent entity were waived during the year due to the significant increase in direct costs incurred by the Company relating to regulatory proceedings and associated costs".

104 Mr Ryan and Mr Meaney signed the DASS Financial Statements for the year ended 30 June 2021 on 7 September 2021. They included this:

Dixon Advisory & Superannuation Services Pty Limited

ABN 84 103 671 666

Notes to the Financial Statements
For the year ended 30 June 2021

4 Revenue

Provision of services revenue

	2021 $	2020 $
At a point in time		
- Corporate advisory	334,573	1,150,196
Over time		
- Advisory and administration	11,277,588	15,564,280
Total provision of services revenue	11,612,161	16,714,476
Other income		
- Commissions received	732,943	1,284,440
- Insurance proceeds	533,107	-
- Interest income	3,213	10,950
- Unrealised FX Gain	1,176	-
Total other income	1,270,439	1,295,390

5. Expenses

Profit before income tax includes the following specific expenses:

	2021 $	2020 $
Consulting and professional fees*	-	16,000,000
Administration and management fees	524,238	912,885
Client rebates	90,947	168,412
Other expenses	273,969	200,260
Commonwealth penalties and related costs, net of insurance		
- Commonwealth penalty	7,200,000	-
- Commonwealth penalty related costs	1,000,000	-
- Other legal and related costs	2,233,771	-
- Insurance recovery income	(1,169,547)	-
	9,265,224	-
Other regulatory proceedings and related costs, net of insurance		
- AFCA external dispute resolution and other income	7,519,848	629,400
- Other legal and related costs	555,088	-
- Insurance recovery income**	(4,283,760)	-
	3,791,176	629,400
Total expenses	13,945,554	17,911,172

*Note: Consulting and professional fees charged by the parent entity were waived during the year due to the significant increase in direct costs incurred by the Company relating to regulatory proceedings and associated costs.

** Note: further related costs may be recovered but are not virtually certain at this time.

16

105 The financial statements were lodged with ASIC on 30 September 2021.

106 On 14 September 2021, McGrathNicol provided a draft Project Fork project plan spreadsheet (**Project Fork spreadsheet**) in accordance with its 2 September 2021 engagement letter. In the Project Fork spreadsheet, McGrathNicol sought to map out all tasks required to be completed in advance of placing DASS into voluntary administration. The Project Fork spreadsheet referred, at the top of the document to "Date of VA: 12/1/2021 [sic] Estimated, update timing as required." (In an updated version of this spreadsheet prepared on 27 September 2021, the estimated date of voluntary administration was corrected to 12/1/2022.)

107 Mr Ryan deposed that a copy of the Project Fork spreadsheet was saved to a Dropbox folder to which he, Messrs Falkiner, Hill, Selvaratnam and Mr Robert Darwell (Director – Corporate Finance & Strategy) had access, along with Messrs Smith, Wharton and Mr Jeremy Cohen from McGrathNicol, so that it could be updated from time to time as tasks were progressed. While all had editing privileges, the practice was that McGrathNicol would update the status of tasks from time to time.

Conversation between Mr Ryan and Mr Anderson

108 In July, August or early September 2021 — it was not clear exactly when — discussions occurred between Mr Ryan and Mr Anderson over the telephone in relation to a question that is central to this case.

109 What was in fact said in the course of that conversation, and in particular whether they discussed that the receivable in favour of DASS would be extinguished after the ASIC proceeding and AFCA provisions

were paid, was the subject of controversy at trial.

110 I set out the evidence given by Mr Ryan and Mr Anderson about their conversation below.

111 In his affidavit, Mr Ryan deposed as follows:

> … I had a conversation with Mr Anderson in which I told him that due to the large provisions to be recognised in DASS's accounts in respect of the ASIC Proceeding and the AFCA claims and the mismatch in timing with the insurance receivable asset, it was necessary for EPO to waive the Management Fee that it would ordinarily charge to DASS for FY2021 so as to keep the intercompany receivable high enough to leave DASS net asset positive, as required for it to retain its AFSL. I told him that the result was that the balance of the intercompany receivable in favour of DASS would increase, not be reduced. **Mr Anderson responded by saying that he understood and agreed that this was the appropriate course but that I needed to document the arrangement between DASS and EPO in the coming weeks** because the large majority of DASS liabilities were provisions and might not ever become due and payable, **DASS had insurance that was responding to the AFCA claims and the Group was not agreeing to an unconditional transfer of resources to DASS by agreeing to waive the Management Fee**. I responded that I understood and would attend to documenting the arrangement between DASS and EPO with respect to the intercompany receivable.
>
> In around late August or early September 2021, during at least one of the weekly finance team meetings, I mentioned to Mr Hill and Mr Selvaratnam that the arrangements between DASS and EPO with respect to the intercompany receivable needed to be documented to reflect the fact that the Group was not agreeing to an unconditional transfer of resources to DASS by agreeing to waive the Management Fee and that it was on my to do list.
>
> From around early September 2021, approximately every two or three weeks, Mr Anderson asked me "*How are you going documenting the intercompany loan?"*, to which I responded that I had not gotten to it yet but that I would get to it.
>
> It took me longer than I had hoped to commence the process of documenting the intercompany receivable between DASS and EPO. This was because I was busy with a wide range of tasks, including finalising the Group and then subsidiary accounts for FY2021, as well as performing my other day-to-day functions and undertaking numerous other tasks with respect to Project Fork …
>
> (Emphasis added.)

112 During his cross-examination, Mr Ryan gave the following evidence about his conversation with Mr Anderson, as follows:

> Did you understand Mr Anderson was asking you to go away and draft an agreement that dealt with anything other than the 11.6 million waiver of the management fee?---Yes.
>
> You understood he was asking you to do more than that?---Yes.
>
> What did you understand he was asking you to go away and do?---Document the understanding that the ASIC provisions and the AFCA claims, which were the substantial reason for the intercompany receivable being as high as it was, in effect, needed to be documented based on the understanding we had. So it was that full amount.
>
> And did you discuss that the thing to be documented was to impose a condition on the otherwise recoverability of the receivable?---It was implicit in the discussion with Mr Anderson that the

receivable balance was left that high because of those provisions. If those provisions never fell due and payable or insurance responded, the effect was that the receivable should drop away because the group would not otherwise agree to it - - -

And so - - -?--- - - - being that high.

I'm sorry. Did you understand Mr Anderson to be discussing with you that the receivable was only to be called upon to pay if necessary an ASIC penalty [and] the AFCA claims?---With the exception of the BAU transactions, yes.

Do you accept that that was a substantial condition on the recoverability of the receivable?---Yes, just as it would have been a substantial imposition on the group to leave the receivable that high.

113 In his affidavit, Mr Anderson deposed as to his recollection of the conversation with Mr Ryan, including as follows:

The approach that AFCA had adopted to the DASS client claims and the commencement of the ASIC proceeding meant that the Group had to give consideration to the amount of any provisions to include as liabilities in the Group's accounts for FY2021. At the same time, the Group also had to determine the amount of corresponding insurance receivable assets that could be included in the Group's accounts for FY2021 in respect of the AFCA determinations. The Group's insurers had told it that any penalty paid in the ASIC proceeding would not be covered by insurance. Mr Ryan and his finance team were primarily responsible for these tasks and they worked closely with Deloitte to develop an appropriate methodology for the AFCA claims.

At some point in early September 2021, at around the time that the DASS financial accounts were signed-off, Mr Ryan told me that because of the difference between the provisions that DASS had to recognise as liabilities in its financial accounts for FY2021 in respect of the ASIC and AFCA claims and the (lower) corresponding insurance recoverable assets that DASS could recognise, EPO had waived the management fee that it would ordinarily have charged DASS for FY2021 so as to ensure that there was a sufficiently high balance of the intercompany receivable between DASS and EPO in DASS's favour for DASS to maintain positive net assets, as required for its AFSL. Mr Ryan told me that it was his strong expectation that DASS's insurance position would ultimately be much better than DASS could recognise in its accounts because it was expected that all of the URF-related AFCA claims would end up being covered by insurance, but the relevant accounting standards imposed a recognition test of virtual certainty that DASS could not meet at that time.

When Mr Ryan told me this, I said to him that he needed to go and document the arrangement by which the intercompany receivable balance was increasing so as to make it clear that this was a bridging mechanism by which the Group was providing financial support to DASS. I said that we both knew that the AFCA claims were to be paid by insurance and that there was no scenario in which the Group would agree to put cash into DASS to cover those claims just because of the timing difference in the accounting standards. I said that I did not want a transfer of wealth from the Group to DASS in circumstances where DASS was loss-making, being propped up by the Group, and at risk of voluntary administration, because this would be at the expense of the EP1 shareholders, which would not be fair on them. Mr Ryan responded that he understood and would take steps to arrange the documentation.

I cannot now recall a specific conversation on a specific date with Mr Ryan in which I explained the following further matters to him, but in the course of our day-to-day interactions, I conveyed to him that:

(a) I considered that the Group had previously been propping up DASS because the management fee that EPO could charge to DASS had been capped at 90% of DASS's revenue, despite the fact that the costs borne by the Group in responding to the various claims against DASS had been much larger than this.

(b) The need that had just arisen to maintain the intercompany receivable at the high level of approximately $19 million, so as to cover the provisions in DASS's accounts for both the ASIC proceeding and the AFCA claims, had greatly exacerbated this problem.

(c) As far as I was concerned, there was no scenario in which I would allow DASS's creditors to end up with a windfall gain at the expense of EP1's shareholders when DASS had been permitted by the Group to hold these assets only so that DASS could retain its AFSL while the Group sought to deal with the claims against DASS in the best way that it could for the benefit of the DASS clients.

(d) I was not prepared to permit EP1's shareholders to wear such a result, particularly in circumstances where many of them had already suffered very substantial losses as a result of participating in the public listing of EP1 at a purchase price of approximately $2.50 and then seen the share price fall to well below $1, primarily due to issues related to URF.

114 Mr Anderson gave the following evidence about the conversation in the course of his cross-examination:

…Mr Anderson. I was very clear. I want you to tell his Honour what, if any, recollection you have on what you told Mr Ryan to go and document; do you have any recollection of that? --- It would not have been specific; it would have been conceptual.

Yes. Do you recall what you told him, or do you assume what you told him?---No. I definitely spoke to ASIC and – and the AFCA claims as are in here, as reflected in this paragraph.

Yes. And please only answer if you recall, but you recall telling Mr Ryan something about the ASIC claims and the AFCA claims; is that correct?---The ASIC – the ASIC penalties and – and the AFCA claims? I – yes.

…

Yes. And what did you tell Mr Ryan to go into the document, as best you can recall?---So, I wanted the nature of the support that was being provided to be documented. And how that occurred was – I left for Paul to go away and work out – my expectation was with the lawyers. But they were the two key pieces that I was focused on the whole time.

…

Yes. And when did that change occur? At what period of time?---I'm saying at the point when Mr Ryan came and told me that because of their accounting treatment in September '21 when he came and told me that the management fee was going to be waived, which was the first I had heard of it, and wasn't expected, I believe it changed then, and I've effectively said to him, "Well, you're going to do that, and increase that loan balance because of the waiver of the management fee, then it needs to be conditional." So that's when I think, effectively, and admittedly I said, "You need to go away and document it, and articulate what those conditions are", but – that's my answer.

Yes. So your evidence to his Honour is that the conditions were imposed in and around the time that you and Mr Ryan spoke in September 2021?---When the management fee was waived, yes.

Yes?---That was the trigger for it, yes.

Yes, that was the trigger for the conditions coming into existence on your evidence. Is that correct?---Yes.

And the conditions were spoken of between you and Mr Ryan. Is that correct?---Conceptually, yes. As in, the conceptual conditions, yes, between me and Mr Ryan.

…

You accept and would agree to his Honour that the imposition of any conditions of this type was to the detriment of DASS, and the benefit of EP Ops. That's correct, isn't it?---I don't agree with that. So – so DASS without the support of – so the group has had to provide the support in terms of both the 8-plus million dollars in relation to ASIC, and also in relation to the AFCA claims, and, Mr Solomon, we've ended up in insolvency. We were trying not to go get there, and there were a whole lot of moving parts at the time that haven't come in today, including other parts of the group, but DASS actually had the benefit of that support from the group. That was definitely an asset for DASS. It gave it an opportunity to work through things that didn't actually work out, but to suggest that they're not the beneficiary is completely wrong. This was the group providing financial support – conditional financial support to DASS which was chronically loss-making, was – was experiencing all sorts of difficulties that you're aware of, and this support was giving DASS the potential to move past that. It didn't happen, but that's what the support provided.

Do you accept that the imposition of new conditions in respect of the receivable was to the advantage of E&P Ops?---Well, no, because the conditions were only required because the receivable changed in nature. The receivable wasn't – this wasn't – we had a discussion about it. [I] was told about the receivable. I was told that the management fee was waived without any prior warning. We had – on behalf of the group, the management – the careful management of that loan was required for the purpose that it – we didn't – it couldn't get out of hand – the broader group couldn't pay out a silly number in relation to the loan, and so the support that was provided was always intended to be conditional on behalf of ASIC. It was – it only arose at the last minute on behalf of the AFCA claims, which, again, were 100 per cent backed by insurance. So, that's why it became conditional, and the nature of the support changed. The support historically was just around the operating performance of the business. The revenue and the expenses. That was all the support was historically; that was all it was reflected. It transitioned in '21 with the need to reflect these – I'll call them extraordinary items. They were clearly one-off, significant, unusual items that affected the business. They were way outside the ordinary course of business. People like Mr Ryan, who were trying very hard to deal with it were frankly – it was very challenging, and it's reflected in the set of circumstances. But I don't accept – the nature of the loan definitely changed; the waiver of the management fee changed; the conditions were always there in relation to the ASIC piece; and it's unfortunate the way this has played out …

October 2021

115 On 14 October 2021, Maurice Blackburn filed and served proceedings against DASS in the Federal Court on behalf of their clients, who alleged that DASS breached its retainer or duties, and provisions of the Act, and sought compensation for loss and damage in the amount of $900,000.

116 On 15 October 2021, ASIC and DASS filed a statement of agreed facts, joint submissions and a proposed minute of order to give effect to the settlement in the ASIC proceeding. A penalty hearing was

listed before the Federal Court for 25 November 2021. Mr Ryan deposed that if the court approved the penalty following that hearing, his intention was that EPO would make the penalty payment on behalf of DASS, which would thereby reduce the intercompany receivable in favour of DASS.

117 On 25 October 2021, Mr Cohen of McGrathNicol sent an email to Messrs Ryan, Anderson, Meaney, Araullo and Falkiner attaching a working draft of the Project Fork contingency planning document.

118 Mr Cohen's covering email noted that the advice would continue to be updated as additional legal advice was received and the contingency plan was refined.

119 The report included various references to the ways in which managing DASS client interests as best as possible could be achieved through the planning of a voluntary administration and subsequent DOCA process.

120 Separately, on the same day, McGrathNicol issued a presentation titled "Project Fork Solvency Considerations".

121 Among other things, it concluded that, from both a cash flow and balance sheet perspective, DASS was solvent, but that:

> Given that various triggers could increase the risk of DASS becoming insolvent, Directors should plan for the appointment of a Voluntary Administrator if the financial position of DASS deteriorates. In undertaking this planning, key considerations include:
>
> - A pre-emptive VA appointment may be advisable if DASS becomes "likely" to become insolvent as a result of various trigger events occurring;
>
> - It may be beneficial for various events to have occurred prior to any such VA appointment, to improve certainty and reduce the extent of creditor claims, including:
>
> - Court approval of the ASIC settlement;
>
> - URF sale (potentially reducing quantum of claims);
>
> - NEW/USF merger announcement (potentially reducing quantum of claims); and
>
> - Progression (or discontinuation) of the Class Action statement of claim.

122 Also on 25 October 2021, somebody within the Project Fork team saved an updated version of the Project Fork spreadsheet. The new version of the spreadsheet now included the following tasks:

> C2.1 Produce a memo and updated analysis to update the appropriateness of the calculation methodology for DASS' management fee. Ensure that proportion of DASS revenue charged include external costs such as Adviser fees (legal and McN) and management time where appropriate. Obtain approval from DASS and E&P Directors that methodology is fair.
>
> C2.2 Finalise loan agreement between E&PO and DASS with condition that loan can only be called where debs [sic] are due and payable. Minters to review agreement.

123 In relation to this new version of the Project Fork spreadsheet, Mr Ryan deposed as follows:

> Although the version of the Project Fork Plan Spreadsheet was first saved on 25 October 2021, from my review of that version, it appears likely that further edits were made to the document after that date. This is because Task C2.2 is identified as: (i) having an 'estimated task start date' of 9

November 2021; and (ii) being 50% complete (notwithstanding that, as at 25 October 2021, Minter Ellison had not yet been instructed to prepare any loan agreement between EPO and DASS).

124 On 27 October 2021, Mr Ryan attended the meeting of the EP1 Board. Mr Anderson presented to the Board in relation to the status of Project Fork. The minutes of the Board meeting relevantly record:

> Referring to the McGrathNicol report, it was noted that the net asset position of DASS, in conjunction with confirmed insurance cover and head company support (in relation to the ASIC liability) **mean that DASS is solvent**. It was further noted that, notwithstanding the existence of a number of potential additional liabilities (primarily contingent liabilities), the availability of insurance, the timing of payments and existence of cash on hand mean there is currently a significant solvency buffer.

125 As part of the Project Fork presentation, a report entitled "DASS quarantine option" was also presented to the Board. The quarantine option report reiterated the advice of McGrathNicol that DASS was currently solvent. In addressing the option to place DASS into voluntary administration, it noted that this would facilitate a client remediation scheme via a DOCA. The quarantine option report also stated that EP1 would accept the outcome of the ASIC process and EP1 would voluntarily contribute the full penalty and costs amount in the ASIC proceeding into a DOCA. More specifically, the quarantine option report addressed the objectives of a DOCA process for DASS as follows:

> (i) balance of insurance proceeds (estimated $15 million), ASIC liability ($8.2 million), additional voluntary contributions (say, $10 million) all applied to DOCA
>
> (ii) seek to ensure all claimants treated pari passu subject to insurance mechanism
>
> (iii) Court directions possibly required to stop AFCA claim process and ensure pari passu treatment

126 Mr Ryan deposed that on the basis of the quarantine option report, he "expected that the Group would make available to DASS clients a total amount that was at least as great as the balance of the intercompany receivable in any DOCA proposed by the Group, even if DASS and EPO executed an agreement prior to the voluntary administration that placed limitations on the circumstances in which DASS could call for repayment of the intercompany receivable."

November 2021

127 On 1 November 2021, a representative proceeding was commenced by Piper Alderman in the Federal Court against DASS, EP1 and Mr Alan Dixon on behalf of DASS clients who had invested in the URF and related products. It was served on 3 November 2021.

128 On 5 November 2021, Mr Ryan asked Mr Hill to prepare an analysis of the intercompany loan balance as part of a briefing pack that would be provided to McGrathNicol and MinterEllison for the purpose of documenting the intercompany receivable.

129 On 8 November 2021 (at 10.27am), Mr Hill sent an email to Mr Ryan attaching a spreadsheet analysing the intercompany balance between DASS and EPO, stating:

> Just further to our chat on Friday and prior to our Fork call this afternoon, I have prepared an analysis of the intercompany balance as at 30 September 2021 (the October numbers will be finalised soon) in relation to the "offsetting" provision amounts against the intercompany balance.
>
> Of the $20.3m intercompany balance, there are offsetting provision amounts totalling $19.1m as at 30 September 2021. I would assume that this provisions balance will be larger again in October 2021 given the additional AFCA determinations that have landed.

> Note there is also $5.5m of insurance receivable, so I'm not sure how this would be treated in a situation where we are effectively holding an intercompany receivable balance to offset the provisions held.

130 Later on 8 November 2021, at around 1pm, Mr Ryan participated in a conference call with the Project Fork team and McGrathNicol. The invitees for the call were Messrs Falkiner, Hill, Smith and Cohen.

131 MinterEllison joined a further call held at 3pm. Mr Ryan deposed that he told the Group's advisors that "we" needed them to document an agreement in respect of the intercompany receivable between DASS and EPO; that the current balance of the receivable was to the credit of DASS in an amount of approximately $20 million; and that the Group had been required to leave the balance this high because it needed DASS to have an asset that offset provisions that DASS had to recognise of approximately $19 million due to the ASIC proceeding and AFCA claims, so as to satisfy the conditions of its AFSL. He added that he said that to keep the balance high enough, EPO had waived its management fee for FY2021, which it would otherwise have charged to DASS so as to reduce the intercompany receivable.

132 Mr Ryan also deposed that he said that insurance was responding to all the AFCA claims, but accounting standard issues meant that the corresponding insurance receivable that DASS could recognise as an asset was much lower than the provisions. He said that the claim priority needed to be that when a claim crystallised, DASS would first call on its available insurance and only then call on the intercompany receivable; and that DASS should not be permitted to call on the intercompany receivable unless and until a claim had actually crystallised and it was not covered by insurance.

133 Mr Ryan further deposed that at the conclusion of the call, the McGrathNicol representatives said that they would work with the Project Fork team to prepare an initial draft set of commercial terms, which would then be provided to MinterEllison to use as the basis for preparing a formal agreement.

134 Mr Hill made a note of a weekly finance team meeting on 9 November 2021, which stated the following in relation to Project Fork:

> Intercompany receivable → flexibility for cash offered to from ASIC
>
> Management fee is actually costing $X → bring down the net asset
>
> Documentation around the intercompany and what funds are to be used for DASS → test the provisioning
>
> "Management fee to 90% → check for solvency and document.
>
> FWM staff, rent, IAS.
>
> → What would be normal course of business And then overlay of the additional legal/regulatory costs etc
>
> → Management fee

135 Mr Ryan further deposed:

> I do not now specifically recall what was said at the above meeting but the notes are consistent with my recollection of the matters I was seeking to advance in respect of Project Fork at that time, namely to document the intercompany receivable between DASS and EPO and to take all properly available steps to reduce the balance of the receivable. It was not obvious to me at this time how the

intercompany receivable should be documented. Because the intercompany receivable concerned a balance of funds in favour of DASS, I assumed it would need to be some form of loan agreement that stipulated the terms upon which DASS could call for repayment. But I had some trouble understanding how to deal with the fact that the "loan" had already been advanced to DASS. I was not familiar with the concept of a deed of acknowledgement of debt at this point. I relied on Minter Ellison to determine the most appropriate way to document the intercompany receivable.

136 On 10 November 2021 (at 9.20am), Mr Smith sent an email to Mr Falkiner attaching a copy of a draft set of summary terms which were to be provided to MinterEllison.

137 The operative parts of the draft were in these terms:

Background

From time to time, intercompany loans are provided between members of the EP1 Group which arise due to intercompany charges, management fees, tax consolidation, sharing accounting, cash sweeps and other specific funding requirements.

As at [30 September 2021], intercompany loans exist between DASS and EP1 Group entities as per Schedule 1. The net loan position to DASS has principally arisen due to:

- E&PO charges DASS a management fee in respect of the costs E&PO incurs to service DASS (e.g. employee expenses, professional fees, service contracts, premises and services cost). The nature and accounting for such costs is recorded in a separate accounting paper;

- EP1 (via E&PO) has agreed to fund the ASIC Penalty and Costs, recorded as a liability in DASS, subject to the terms in this [Agreement];

- E&PO has agreed to fund the Crystalised AFCA Claims and associated legal fees, recorded as a liability in DASS, subject to the terms of this [Agreement];

- E&PO has agreed to fund the Uncrystallised AFCA Claims and associated legal fees, as recorded by DASS as a provision, subject to the terms of this [Agreement]. This available funding recognises that DASS has had to record provisions for Uncrystallised AFCA Claims under AIFRS.

Terms of the loan

- The loans are unsecured and non-interest bearing.

- The loans are on call, subject to the following provisions:

    - The intercompany loan amounts in respect of the ASIC Penalty and Costs will be payable upon:

        - ASIC Penalty and Costs become due and payable as determined by a court; and

        - DASS remains a going concern.

- The intercompany loan amounts in respect of the Crystalised AFCA Claims and associated legal costs will be payable upon:
    - Crystalised AFCA Claims become due and payable according to the EDR or IDR process; and
    - receipt of Insurance monies (directly by DASS or as directed to DASS by E&PO); and
    - DASS remaining a going concern.
- The intercompany loan amounts in respect of the Uncrystallised AFCA Claims will be payable upon:
    - The AFCA claims being settled with the claimant (IDR) or upon preliminary determination from AFCA or if not accepted final determination from AFCA (EDR); and
    - receipt of Insurance monies (directly by DASS or as directed to DASS by E&PO); and
    - DASS remaining a going concern.

    DASS cannot call an intercompany loan until and unless the underlying claim has become due and payable via the AFCA process or is payable via an IDR process.
- DASS cannot call an intercompany loan should an underlying claim only be recognised as a provision for accounting purposes in DASS' Statement of Financial Position.
- Refer to the Tax Sharing Agreement for terms associated with loans arising under the tax consolidation and sharing policies of the EP1 group.

138 On 10 November 2021 (at 10.33am), Mr Falkiner sent an email to Mr Ryan and Mr Hill as follows:

> McGrathNicol has put together some draft terms regarding the intercompany arrangement between DASS and E&PO. I've had a read through and added a few comments/questions. Can you please both review and provide any additional comments/thoughts and I can then send to Minter Ellison for review and to draft other applicable terms?
>
> Also happy to setup some time to discuss if you'd like – just let me know.

139 As Mr Ryan explained, the email contained a link to "draft terms", which Mr Falkiner had saved into a common drive so that the team could all edit the one version of the document, which was "a practice that the Group often adopted when it was likely that multiple people would have input into a document, rather than sending an attachment to the email".

140 The Project Fork team proceeded to review and make comments on the draft terms document, which was then sent back to McGrathNicol.

141 On 11 November 2021 at 1.14pm, Mr Falkiner sent an email to Mr Oude-Vrielink at MinterEllison (copying Messrs Ryan, Araullo, Smith and Cohen) together with a briefing pack of relevant documents, being the "summary set of terms"; EP1 Management fee memorandum for FY2021; extracts of the EP1 Board Minutes for 24 June 2021 and 30 June 2021; and extracts of the DASS Board Minutes for 24 June 2021 and 30 June 2021. The email read as follows (omitting formal parts):

> Hi Bart,
>
> As discussed on Monday's call, we have drafted a summary set of terms (attached) relating to the intercompany loan arrangement between DASS and E&P Operations for your review and input. The terms refer to two other documents which are also attached for your reference (we note that the Memo contains a summary of management fee methodology for FY21 and the waiver of the management fee for DASS in FY21).
>
> Also attached for your reference are the relevant EP1 and DASS resolutions (from June 2021) regarding the provision of financial support to DASS for the ASIC settlement. These documents refer to the * '*Maximum Amount*', which is defined (in the Proposed Resolutions) to mean '…terms of a settlement of the Proceeding at or following on from the Mediation within the parameters set out in the Summary, including a penalty amount up to an overall maximum of $10 million'.
>
> We are seeking your advice on the following:
>
> a. a. drafting any additional technical/legal terms of the intercompany loan arrangement so that it is in a form that can be executed; and
>
> b. b. Confirming that the proposed terms to do not raise any concerns / issues (particularly in the event of a DASS voluntary administration – such as ipso facto).
>
> Please let us know if you need any additional information prior to commencing and/or would like to discuss.

142 On 15 November 2021, the lead plaintiff in the Piper Alderman class action sought to intervene in the ASIC proceeding to have any amount paid by DASS as a penalty redirected to a payment into court for the benefit of all creditors pursuant to section 1317QF of the Act.

143 As part of that application, Mr Ryan became aware that the applicant intended to submit that the losses claimed by the class would amount to between $278 million and $463.9 million.

144 As Mr Ryan explained, following the class action plaintiffs intervening in the ASIC proceeding, the 25 November 2021 hearing date of the ASIC proceeding was adjourned and subsequently re-listed for 28 January 2022. This meant that the penalty agreed with ASIC did not become due and payable on the dates anticipated under the heads of agreement, because those amounts were subject to court approval and court orders were not going to be obtained until 28 January 2022. As a consequence, "the intercompany receivable between DASS and EPO would not be reduced as had been expected (ie following payment of the agreed penalty by EPO on DASS' behalf …)"

145 At around the same time, Mr Ryan had a discussion with Mr Anderson in which Mr Anderson stated that the intervention of Piper Alderman in the ASIC proceeding meant that there was now some prospect that DASS would be placed into voluntary administration prior to the Federal Court making orders for DASS to pay the agreed penalty and costs, and that if that occurred the Group should still honour its commitment to pay these sums by voluntarily contributing the $8.2 million to any DOCA that it proposed in respect of DASS.

146 Mr Oude-Vrielink replied by email dated 22 November 2021 to the 11 November request for advice, in which he said, among other things:

> If the Loan Document in fact provides for 'a new advance of money or credit' from E&PO to DASS, i.e. the loans under the Loan Agreement are undrawn when DASS' enters VA, then in accordance with s451E(8) of the Corporations Act, if the Going Concern Condition is stayed under s451E(1), DASS' right to call for the loans cannot be enforced during the applicable stay period.

147 Mr Ryan deposed that he read that advice and "formed the view that Minter Ellison had not properly understood the nature of the intercompany receivable and the terms we wanted documented" and that he "told Mr Falkiner and Mr Hill that Minter Ellison had not fully understood our instructions and that we needed to discuss the matter with Mr Oude-Vrielink".

148 Mr Oude-Vrielink sent another email to the Project Fork team on 25 November 2021, in which he noted:

> I understand that due to the waiver of the usual management fees charged by EP Ops to DASS on account of the expenses that EP Ops pays to support DASS's business as outlined in the management fee methodology memorandum attached to your email, there is a large and growing intercompany loan account between those 2 companies with EP Ops owing DASS something in the order of $20m.

149 The email went on to make certain recommendations not presently relevant.

150 On 26 November 2021, Mr Smith of McGrathNicol provided his comments on the MinterEllison advice, saying, as follows:

> Hi Paul, Marc, Francis
>
> I have marked comments below in red.
>
> The key item missing for mine is that we want the E&O Ops loan to DASS to be only callable for AFCA claims that become due and payable following AFCA determination or settlement, and only to the extent that insurance is not available for those claims. I.e the loan only exists expressly to respond to determined / settled claims where insurance is not available. From the date of VA, those AFCA claims will likely never become due and payable (assuming AFCA stops determining/settling claims). Rather, those liabilities will turn into claims recognised / adjudicated by the VA or deed administrator, which should not be callable under the loan.
>
> Suggest we have a specific call with Bart to explore this.

151 Later on 26 November 2021 (at 4.58pm), Mr Falkiner forwarded the email chain concerning the 25 November MinterEllison advice, including Mr Smith's comments, to Mr Hill.

152 Mr Ryan deposed that he "sought to involve Mr Hill in the preparation of the documentation of the intercompany receivable because I wanted the Group to have the benefit of his accounting expertise and because I expected that he would ultimately sign the documentation in his capacity as a director of EPO, whilst I would sign it in my capacity as a director of DASS. I wanted to make sure that Mr Hill was given an opportunity to satisfy himself that the documentation was appropriate".

December 2021

153 In early December 2021, Mr Ryan worked with Mr Anderson to progress Project Fork. Although they had not made any final decision to place DASS into voluntary administration, Mr Ryan deposed that "the likelihood of us making that decision in the coming weeks was increasing and I wanted to make sure that the Group was prepared for that eventuality".

154 To that end, he worked with EP1's advisors to prepare a draft ASX/media release announcing any voluntary administration of DASS and participated in discussions with Deloitte as to whether it would be necessary for the Group to recognise a provision in its upcoming half-yearly accounts in respect of the Piper Alderman class action.

155 On 9 December 2021 (at 11.12am), Mr Oude-Vrielink sent an email to Mr Falkiner (copied to Messrs Ryan, Araullo, Smith, Cohen and others) attaching MinterEllison's initial draft of the intercompany loan agreement between DASS as the "Borrower" and EPO as the "Lender", with MinterEllison's comments on the draft embedded.

156 Relevantly, the operative terms of the draft provided as follows:

> 3. **Purpose** The Lender has agreed to provide Loans to the Borrower for payment of:
>
> - the ASIC Penalty and Costs, which has been recorded as a liability in the Borrower's [Statement of Financial Position];
>
> - the Crystalised AFCA Claims and associated legal and AFCA fees, recorded as a liability in the Borrower's [Statement of Financial Position]; and
>
> - the Uncrystallised AFCA Claims and associated legal and AFCA fees, as recorded by the Borrower as a provision in its [Statement of Financial Position]. This available funding recognises that the Borrower has had to record provisions for Uncrystallised AFCA Claims under AIFRS without being able to recognise a fully offsetting insurance receivable asset.
>
> 4. **Drawdown** Loans may be advanced in an unlimited number of successive drawings up to the Facility Limit, provided that [two Business Days'] notice is given prior to a drawing.
>
> The Loans are on call, subject to the following provisions:
>
> - the Loan amounts in respect of the ASIC Penalty and Costs will be payable upon the ASIC Penalty and Costs becoming due and payable as determined by a court;
>
> - the Loan amounts in respect of the Crystalised AFCA Claims and associated legal and AFCA fees will be payable upon the Crystalised AFCA Claims becoming due and payable in accordance with the relevant AFCA process; and
>
> - the Loan amounts in respect of the Uncrystallised AFCA Claims and associated legal and AFCA fees will be payable upon the AFCA claims being settled by negotiation with the relevant claimant or upon preliminary determination from AFCA or, if not accepted, final determination from AFCA.
>
> The Borrower cannot call a Loan in respect of Crystalised AFCA Claims and Uncrystalised AFCA Claims until and unless the underlying AFCA claim has become due and payable via the appropriate AFCA process.
>
> [The Borrower cannot call a Loan should an underlying claim only be recognised as a provision for accounting purposes in the Borrower's Statement of Financial Position.]
>
> …

6. **Repayment** The Borrower must pay all of the Money Owing to the Lender on the Termination Date.

157 "Termination Date" was defined to mean the first to occur of:

(a) the date which is [X years] from the date of this document;

(b) the date on which the Borrower ceases to be a part of the EP1 Group;

(c) the date on which the Lender terminates this Agreement for convenience; and

(d) any earlier date on which the Money Owing becomes due and payable under this document.

158 On the same day, McGrathNicol provided its comments on the initial draft of the intercompany loan agreement in a document attached to an email sent by Mr Smith to Messrs Falkiner, Ryan and Araullo, which Mr Ryan forwarded to Mr Hill. The email relevantly read:

Hi E&P team

We have made various comments in the attached, as well as some rough edits to illustrate some comments. Most comments arise to follow a change in premise such the agreement is documenting the conditions under which E&PO has agreed to be indebted to DASS (rather than E&PO lending new money to DASS).

I suggest we have a call between us to compare notes and align before going back to Minters. Best times for me tomorrow would be 9am, 1pm and 3pm.

159 The McGrathNicol comments embedded in the draft included, among a host of other comments not directly relevant here: "Worth including something that makes it clear that this agreement is documenting/formalising historical practice/understanding?" This wording was also proposed to be included:

1. Background

A. The Parties have historically engaged in regular intercompany transactions between them, which are recorded by way of an intercompany loan account.

B. At this time, E&PO is indebted to DASS under certain conditions. E&PO has agreed to make monies available to DASS in the event that certain [Claims] become due and payable.

C. This agreement formalises the terms of the intercompany loan.

160 The next day, on 10 December 2021, Mr Falkiner returned to MinterEllison a marked-up version of the intercompany loan agreement containing the combined comments of the Group and McGrath Nicol, attached to his email of that date, copying Messrs Ryan and Araullo and others. The email relevantly read:

Hi Bart,

Thanks for sending through the draft agreement. We have now had a chance to review and have attached a marked-up version with some suggested changes and comments. We thought it would be worth setting up some time on Monday to talk through our markups, if you would find it helpful?

If so, please let us know a few times that work for you and we can setup a call.

161 The comments embedded in the draft included comments by Mr Ryan and Mr Falkiner. The latter suggested "[i]nclud[ing] reference to the types of transactions that have led to the intercompany balance – i.e., been in place for many years, has been used in respect of accounting for revenue and cash transfers, charging (and, in FY21, the waiver of) management fees, AFCA provisions and ASIC penalty". The following wording was proposed:

> **1. Background**
>
> A. The Parties have historically engaged in regular intercompany transactions between them, which are recorded by way of an intercompany loan account.
>
> B. Those intercompany transactions include recognition of revenue sourced by DASS but collected by E&PO, as well as E&PO charging DASS a management fee to reflect expenses E&PO incurs to enable DASS to operate and service its clients, for instance the employment of advisers, office leases and IT systems.
>
> C. Due to the need under accounting standards for DASS to recognise provisions in respect of certain [Claims] in the year ending 30 June 2021 without the ability to recognise an insurance receivable on the same basis, E&PO temporarily suspended charging DASS a management fee.
>
> D. Hence at this time, E&PO is indebted to DASS under certain conditions. E&PO has agreed to make monies available to DASS in the event that certain [Claims] become due and payable.
>
> E. This agreement formalises the terms of the intercompany loan.
>
> (Marked-up edits not shown.)

162 On 13 December 2021, Mr Ryan had a call with MinterEllison, along with Messrs Falkiner, Araullo, Smith and Cohen. During that call, a member of the Project Fork team told MinterEllison that the intercompany loan agreement was intended to document the terms on which DASS could call on the existing balance of the intercompany receivable, and not to provide for a new facility from EPO to DASS. MinterEllison said they had not previously understood this and they would redraft the agreement to reflect this.

163 By 17 December 2021, the draft deed had been entirely restructured as a deed of acknowledgement of intercompany debt or "DOAD" "with restrictions on when the intercompany debt is repayable by [EPO]". This was the first time that a draft document had contemplated that the receivable would be reduced to zero upon the payment of the specified payments. In particular, it contained a draft clause that read: "(a) After [EPO] has made all required payments under clause 4.2, the Intercompany Debt is deemed to be satisfied, whether or not the required payments equal or are less than the amount of the Intercompany Debt acknowledged under this Deed". The required payments were the ASIC Penalty and Costs, the AFCA Claims Payable and the Provisioned AFCA Claims (as defined).

164 Mr Oude-Vrielink sent an email on that date to Mr Falkiner, copied to Messrs Ryan and Araullo, attaching the draft deed, explaining:

> We have restructured this entirely as a deed of acknowledgement of intercompany debt owing by E&PO to DASS with restrictions on when the intercompany debt is repayable by E&PO. We were not sure if the new loan facility from E&PO to DASS remained necessary, so we have left in that drafting but it can be deleted quickly if necessary. In this case, all payments by E&PO to DASS on account of the ASIC and AFCA claims would be by way of repayment of the intercompany debt, and not by way of advance of new loan.

If a new loan facility is to remain, it occurs to us that a concept should be introduced that no advances are to be made by E&PO under that facility while the intercompany debt remains outstanding.

Happy to discuss once you have had a chance to consider.

165 The key terms of the first draft DOAD were as follows:

Background

A The parties as related bodies corporate with a common holding company have historically engaged in regular intercompany transactions between them, which are recorded by way of an intercompany loan account.

B DASS generates revenue through the provision of financial advisory services to clients.

C E&PO performs various intragroup functions (e.g. employment of advisers, management of office leases and maintenance of IT systems) to enable group entities such as DASS to operate and service their respective clients. In doing so, E&PO incurs certain costs and expenses and therefore has from time to time charged DASS a management fee to collect sufficient funds to satisfy its costs and expenses.

D Due to the need under AIFRS for DASS to recognise provisions in respect of certain [Claims] in the year ended 30 June 2021 without the ability to recognise an insurance receivable on the same basis, E&PO temporarily suspended charging DASS a management fee in respect of the period commencing [date] and ended [date].

E Over the same period, since [insert date] DASS has been paying certain costs and expenses incurred by E&PO.

F An Intercompany Debt has therefore accrued and E&PO is indebted to DASS in respect of the Intercompany Debt.

G At the same time, E&PO has agreed to provide a [loan facility] to DASS for the purposes of DASS being able to meet certain fees payable to ASIC and claims made by certain clients and former clients of DASS.

H The purpose of this Deed is to:

(i) acknowledge and record the terms upon which the E&PO owes the Intercompany Debt to DASS; and

(ii) record the terms on which DASS may call upon E&PO to repay the Intercompany Debt.

I E&PO and DASS have agreed to satisfaction of the Intercompany Debt in accordance with the terms of this Deed.

…

1.1 Defined terms

…

Intercompany Debt is, for the purposes of this Deed, agreed to be the amount owing by E&PO to DASS for $[x] in respect of the period 10 January 2019 to 15 August 2019.

…

2. Acknowledgment of Intercompany Debt

(a) E&PO acknowledges that it owes the Intercompany Debt to DASS as a result of DASS paying certain costs and expenses incurred by E&PO since [insert date].

(b) E&PO acknowledges that the abovementioned transactions [have been recorded as an intercompany loan account and a receivable recognised in DASS's Statement of Financial Position as at [date]].

(c) Accordingly, E&PO is indebted to DASS for the total amount of expenses that DASS has paid on E&PO's behalf.

(d) DASS acknowledges that the Intercompany Debt is unsecured and non-interest bearing.

…

3.1 Loan Facility

The parties acknowledges that E&PO has agreed to provide a loan to DASS (Loan Facility) for the purposes of payment by DASS of:

(a) the ASIC Penalty and Costs, which has been recorded as a liability in DASS's [Statement of Financial Position];

(b) the AFCA Claims Payable and associated legal and AFCA fees, [which has been/will be] recorded as a liability in the DASS's [Statement of Financial Position]; and

(c) the Provisioned AFCA Claims and associated legal and AFCA fees, [which has been/will be] recorded by the DASS as a provision in its Statement of Financial Position. This available funding recognises that DASS has had to record provisions for Provisioned AFCA Claims under AIFRS without being able to recognise a fully offsetting insurance receivable asset.

…

4. Intercompany Debt payment terms

4.1 Requirement to repay

The parties agree that the Intercompany Debt will only be repayable by E&PO to DASS after one or more of the following circumstances have occurred:

(a) the ASIC Penalty and Costs becoming due and payable by DASS as determined by a court;

(b) the AFCA Claims Payable and associated legal and AFCA fees becoming due and payable by DASS via Deeds of Release signed by the relevant claimants or in accordance with the relevant AFCA process; and

(c) the Provisioned AFCA Claims being settled by negotiation with the relevant claimant (by way of Deed of Release signed by the claimant) or upon final determination from AFCA

and thereby becoming due and payable.

and then only to the extent necessary for DASS to pay the amount that is then due and payable as expressly provided in clause 4.2.

[DASS cannot call for a loan under the Loan Facility should an underlying claim only be recognised as a provision for accounting purposes in the Borrower's Statement of Financial Position.]

4.2 Repayment amounts

The parties agree that if any of the Intercompany Debt is repayable because the circumstance in:

(a) paragraph 4.1(a) arises, E&PO is not required to make a repayment to the extent the repayment exceeds the amount of the ASIC Penalty and Costs that is then due and payable by DASS;

(b) paragraph 4.1(b) arises, E&PO is not required to make a repayment to the extent the repayment exceeds the amount of the AFCA Claims Payable and associated legal and AFCA fees that is then due and payable by DASS; and

(c) paragraph 4.1(c), E&PO is not required to make a repayment to the extent the repayment exceeds the amount of the Provisioned AFCA Claims that is then due and payable by DASS.

4.3 Satisfaction of Intercompany Debt

(a) After E&PO has made all required payments under clause 4.2, the Intercompany Debt is deemed to be satisfied, whether or not the required payments equal or are less than the amount of the Intercompany Debt acknowledged under this Deed.

(b) Upon satisfaction of the Intercompany Debt in accordance with clause 4.3(a), DASS agrees that E&PO will not have any further liability to pay any amounts in respect of the Intercompany Debt.

(c) For the avoidance of doubt, E&PO will not under any circumstances be required to make a payment under clause 4.2 if the payment, when aggregated with all previous payments under that clause, would cause all payments made under that clause to exceed the amount of the Intercompany Debt acknowledged under this Deed.

4.4 Automatic forgiveness

(a) By force of this clause 4.4, DASS forgives, and releases E&PO from all liability and claims whatever in respect of, all Intercompany Debt remaining outstanding as at the first anniversary of the date of this Deed.

(b) DASS agrees that E&PO will not have any liability whatever to pay any amounts in respect of the Intercompany Debt immediately DASS forgives the Intercompany Debt outstanding under this clause 4.4.

(c) E&PO may plead this clause 4.4 as an absolute bar to any claim by or on behalf of DASS in respect of any Intercompany Debt forgiven under this clause.

…

6. Other Intercompany transactions

(a) The parties routinely engage in other intercompany transactions such as allocation of revenue, charging of management fees and other costs, and accounting under the tax sharing agreement. Such transactions are routinely settled by each party as against the intercompany account and can be set off in accordance with clause [7].

(b) The net intercompany balance arising from routine intercompany transactions as described in paragraph 6(a) are at call and will be due and payable upon notification by the relevant party to whom the relevant receivable is due.

166 That same day, following receipt of the draft DOAD, Mr Ryan emailed Mr Falkiner, Mr Hill and Mr Araullo stating "…ideal if we can review this arvo. If at all possible we are going to need to hold E&PO and DASS Board meetings next Wednesday arvo to approve the deed rather than wait until January".

167 Mr Ryan further deposed that at some time that day he had a call with Messrs Oude-Vrielink, Falkiner, Araullo and Smith during which a member of the Project Fork team informed MinterEllison that the Group wanted to finalise the DOAD quickly because they had started making arrangements for the DASS and EPO Boards to approve entry into the deed and to sign it on 22 December 2021.

168 Later on 17 December 2021, Mr Ryan reviewed the draft DOAD and inserted mark-up amendments and comments, which included:

(a) providing a further explanation in Recital B as to how the intercompany receivable was created, which read "DASS generates revenue through the provision of financial advisory services to clients. In most instances those clients are also provided services by another subsidiary of E&PO, with clients billed (and cash received) on DASS's behalf by E&PO or the other subsidiary. This creates a receivable to DASS from E&PO."

(b) agreeing that a separate new loan facility from E&PO to DASS was not required;

(c) commenting that he "would've thought we want [the Intercompany Debt] to be the entire receivable balance" and noting that that balance was expected to increase by 31 December 2021.

169 On 20 December 2021, Mr Falkiner returned a marked-up version of the draft DOAD to Mr Oude-Vrielink with changes and comments from Mr Falkiner, Mr Hill, Mr Ryan and Mr Smith. The email, which was copied to Messrs Ryan and Araullo, and others included a request for legal advice "in relation to the reasonableness /appropriateness of the proposed arrangement – particularly from a DASS perspective". The email relevantly read:

Hi Bart,

Please find attached an updated version of the draft Deed with our comments and changes for your consideration.

As noted on Friday, we have scheduled a DASS Board Meeting for 12.00pm on Wednesday 22nd, with the intention of reviewing/approving the document (as our office shuts down from the 23rd). As such, could you please endeavour to address the remaining open items and send through a revised draft as soon as possible (with a view to us being in a position to sign on the 22nd)?

In addition, we would also like a brief opinion from Minters in relation to the reasonableness /appropriateness of the proposed arrangement – particularly from a DASS perspective. In this regard, could you please let us know if you think a standalone DASS opinion is preferable (in the context of a Fork VA scenario occurring) or alternatively whether an opinion covering both E&PO and DASS would be sufficient, and begin drafting an opinion based on your preferred approach?

If you have any questions or would like to discuss, please let us know.

170 The changes and comments made by the Project Fork team in the revised draft DOAD included, among other things:

(a) The "Background" section now read as follows:

> A The parties as related bodies corporate with a common ultimate holding company have historically engaged in regular intercompany transactions between them, which are recorded by way of an intercompany loan account.
>
> B DASS generates revenue through the provision of financial advisory services to clients. In most instances those clients were also provided services by another subsidiary of E&PO, with clients billed (and cash received) on DASS's behalf by E&PO or the other subsidiary. This creates a receivable to DASS from E&PO.
>
> C Conversely, E&PO performs various intragroup functions (e.g. employment of advisers, management of office leases and maintenance of IT systems) to enable group entities such as DASS to operate and service their respective clients. In doing so, E&PO incurs certain costs and expenses and therefore charges DASS a management fee to collect sufficient funds to satisfy its costs and expenses.
>
> D Due to the need under AIFRS for DASS to recognise provisions in respect of certain Claims without the ability to recognise an insurance receivable on the same basis, E&PO temporarily suspended charging DASS a management fee in respect of the period commencing 1 July 2020 and ended 30 June 2021.
>
> E An Intercompany Debt has therefore accrued, specifically for the purposes of responding to the Claims, and E&PO is indebted to DASS in respect of the Intercompany Debt.
>
> F The purpose of this Deed is to:
>
> (i) acknowledge and record the terms upon which E&PO owes the Intercompany Debt to DASS; and
>
> (ii) record the terms on which DASS may call upon E&PO to repay the Intercompany Debt.
>
> G E&PO and DASS have agreed to satisfaction of the Intercompany Debt in accordance with the terms of this Deed.

(b) Mr Falkiner confirmed, in a response to a query from MinterEllison, that no loan facility was required under the deed. The loan facility clause, and other references to the loan facility, were accordingly deleted.

(c) The definition of "Intercompany Debt" was amended to the "amount owing by E&PO to DASS as at 30 November 2021", namely $20,717,157. Regarding this definition and figure, Mr Hill commented: "The amount listed - $20,717,157 is the interco balance as at 30 Nov 2021. As this figure will constantly move, do we even need/want to attempt to quantify?"

(d) The "Acknowledgement of Intercompany Debt" clause was amended to read as follows:

> (a) E&PO acknowledges that it owes the Intercompany Debt to DASS as a result of:

(i) Revenue billed and cash received by E&PO and another of its subsidiaries on behalf of DASS for provision of services to common clients; and

(ii) DASS accruing liabilities with respect to the Claims which necessitated the temporary suspension of E&PO charging DASS a management fee ordinarily payable for the 12 month period to 30 June 2021

(b) E&PO acknowledges that the net effect of the abovementioned transactions have been recorded as a receivable recognised in DASS's Statement of Financial Position as at 30 June 2021 and on an ongoing basis as at the date of this Deed.

(c) Accordingly, E&PO is indebted to DASS for the Intercompany Debt.

(d) DASS acknowledges that the Intercompany Debt is unsecured and non-interest bearing.

(e) In regard to the "Satisfaction of Intercompany Debt" clause, Mr Smith commented: "Add a provision that if an event occurs such that the ASIC or AFCA claims never become payable, the debt is forgiven?"

(f) In respect of the sub-clause (b) of the clause titled "Other Intercompany transactions" (which stated "The net intercompany balance arising from routine intercompany transactions as described in paragraph 6(a) are at call and will be due and payable upon notification by the relevant party to whom the relevant receivable is due"), Mr Smith commented: "Does this need to be tempered or quantified at a point in time such that an argument can't be made that the whole amount is payable as it arises from DASS revenue billed by E&PO?"

171 Later on 20 December 2021 (at 7.37pm), Mr Oude-Vrielink sent an email in response to Mr Falkiner, copying Mr Ryan and others, stating:

Hi Marc

I refer to your email below with attachment.

Thank you for your comments on the deed of acknowledgement. We will turn around comments with a view to sending a draft back to you for review in the course of the day tomorrow.

In relation to the opinion, we do not think it wise that DASS receive an opinion from us – in this event the VA of DASS would have access to our opinion, with the potential among other things to place us in a position of conflict as soon as the VA is appointed. We think instead the preferred approach would be an opinion on the appropriateness of the deed for the benefit of E&P Ops and the existing directors of DASS, the latter in their personal capacity as directors, and not for the benefit of DASS as an entity.

On the basis that this is an acceptable approach, we will prepare a draft of the opinion and send it to you in the course of the day tomorrow.

Please let me know if you have any queries or concerns.

172 Mr Falkiner asked Mr Ryan if he was content with the approach proposed by Mr Oude-Vrielink in relation to the advice. Mr Ryan informed Mr Falkiner that he was. The next morning, Mr Falkiner sent an email to Mr Oude-Vrielink confirming that the Group was happy with his proposed approach in respect of the requested advice concerning the entry into the DOAD.

173 Also on 20 December 2021, Messrs Anderson, Falkiner and Ryan met with Stephen Longley of PwC to discuss the potential appointment of a voluntary administrator to DASS. Following the meeting, Mr Falkiner sent to Mr Longley a "Project Fork – Contingency planning briefing pack", which in the "Background" section included the following:

…

2. Mounting claims related to the US Masters Residential Property Fund (URF) mean that DASS Directors may determine that DASS is likely to become insolvent at some future point in time. Contingency planning is being performed accordingly

3. There are multiple evolving issues which will determine whether or not a Voluntary Administrator appointment to DASS is required, but it could be as early as 17 January 2022

Features of the DASS entity and operation

1. DASS is the AFSL licensee vehicle or shell, through which advice services are delivered

2. It provides investment advice as part of bundled services with Dixon Advisory Super Pty Limited

3. It services 5,400 client entities, largely self-managed super funds, classified as retail for financial services purposes

4. Client umbrella contracts are with E&P Operations Pty Ltd (E&PO), a shared services operating company

5. All client assets are held by clients directly or in custody (no client assets at risk)

6. All staff and the operating infrastructure reside outside of DASS

7. DASS has minimal financial resources and effectively operates with group support

8. DASS is therefore unable to provide client services without EP1 resources, infrastructure and client support, and has no tangible assets to monetise

174 On 21 December 2021 at 5.50pm, Mr Oude-Vrielink provided a revised draft of the DOAD for review. MinterEllison had made the following changes, among others:

(a) Recitals D, E and F in the "Background" section were amended as follows:

D During FY21, DASS's expenses increased significantly due to regulatory proceedings and related costs. As a result, [EPO's] management decided to waive the management fee for FY21.

E Over the same period, the parties agreed that DASS would pay the costs and expenses incurred by [EPO] and this would result in the accrual of an Intercompany Debt, which would only be repayable by [EPO] to DASS if the regulatory proceedings resulted in any penalties and/or claims from customers became payable.

F [EPO] has separately undertaken to DASS to advance sufficient funds to DASS meet its liabilities arising out of regulatory proceedings and claims from customers.

(b) Under the clause "Acknowledgement of Intercompany Debt" clause 2(a)(iii) was inserted, which read:

E&PO acknowledges that, subject to the terms of this Deed, it owes the Intercompany Debt to DASS as a result of the following transactions:

…

(iii) DASS paying for fees and costs that were incurred and payable by E&PO.

(c) A new clause 3.2 headed "Insurance claims" was inserted as follows:

> Before E&PO is required to make any repayments to satisfy the Intercompany Debt, DASS must seek to recover any part of the relevant penalties, costs and claims noted in this Deed from insurance policies it or the EP1 Group holds (such as but not limited to professional indemnity insurance) wherever possible.

175 On the same day, Mr Oude-Vrielink provided an initial draft memorandum of advice. It contained, among other things, the following:

> **Background**
>
> …..
>
> 1.7 Among other things, DASS derives revenue through the provision of financial advisory services to mainly retail clients. In most instances, those clients are also provided services by another related body corporate of E&PO, with clients billed and proceeds received on DASS's behalf by E&PO and the other related body corporate, thereby creating a receivable to DASS from E&PO.
>
> 1.8 E&PO performs various intragroup functions, such as the employment of advisers, management of office leases and maintenance of IT systems, to enable DASS (as well as other EP1 group entities) to operate and service its clients. E&PO incurs costs and expenses in performing these services and typically charges DASS a management fee sufficient to reimburse those costs and expenses and provide a reasonable margin.
>
> 1.9 Due to a requirement under the AASB Accounting Standards for DASS to recognise in its financial statements provisions in respect of the Relevant Liabilities without capacity to recognise an insurance receivable in respect of those circumstances, E&PO temporarily suspended the management fee in respect of the period that commenced 1 July 2020 and ended 30 June 2021. The management fee has been reinstated for the subsequent period.
>
> 1.10 Since 1 July 2020, DASS has also been meeting the costs and expenses of E&PO.
>
> 1.11 Due to the above circumstances, particularly those described in paragraphs 1.7, 1.9 and 1.10, an intercompany debt has arisen which E&PO owes DASS. As at 30 November 2021, this intercompany debt amounted to $20,717,156.62 (Intercompany Debt). The parties agreed that the Intercompany Debt would accrue on the basis that repayment would only be required if and to the extent the Relevant Liabilities become payable by DASS.
>
> 1.12 E&PO and DASS propose to enter into a Deed of Acknowledgement of Debt under which, among other things:
>
> (a) E&PO will acknowledge its indebtedness to DASS in respect of the Intercompany Debt;
>
> (b) record that the Intercompany Debt is interest-free and unsecured;
>
> (c) limit the repayment of the Intercompany Debt so that the proceeds of repayment are applied solely to the discharge of the Relevant Liabilities, after the application of any insurance proceeds received by DASS in respect of those Relevant Liabilities; and

(d) any amount of the Intercompany Debt remaining outstanding after the permitted repayment of the Relevant Liabilities will be automatically forgiven,

(**Deed**).

1.13 The limitation of the purposes to which the proceeds of repayment of the Intercompany Debt may be applied, being the discharge, wholly or in part, of the Relevant Liabilities, formed part of the negotiations between DASS and E&PO when the temporary suspension of the management fee ordinarily charged to DASS by E&PO was put in place. The proposed Deed will acknowledge this.

2. Assumptions

We have assumed for the purposes of this memorandum:

(a) that currently DASS is solvent within the meaning of s95A of the Corporations Act; and

(b) the accuracy and completeness of the Background above.

3. Summary

3.1 In our opinion, based on the above Background and subject to the above Assumptions, the directors of DASS should be justified and otherwise acting reasonably if they were to consider that causing DASS to execute the Deed would not involve a breach on their part of their duty to act in the best interests of DASS as long as, at the time of execution, the constitution of DASS included a provision of the type contemplated by s187 of the Corporations Act.

176 I interpolate to note that s 187 of the Act provides that a director of a corporation that is a wholly-owned subsidiary is taken to act in good faith in the best interests of the subsidiary if the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company; and the director acts in good faith in the best interests of the holding company; and the subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's act.

177 Mr Ryan reviewed the draft DOAD and advice on the evening of 21 December 2021, shortly after he received them.

178 Mr Ryan and Mr Falkiner were not happy with the draft DOAD. Mr Ryan wrote to Mr Falkiner in an email late in the evening on 21 December that "[t]his has gone backwards under Minter's pen. I'm midway through a mark up but can't see how we're signing tomorrow ..." Mr Falkiner agreed, responding a couple of minutes later "Yep, I'm going through now too - they seem to have misunderstood (again) the underlying concept that these are all just accounting entries at this point in time ... Here is my version (mid mark-up) but happy if you want to send me yours and I'll consolidate comments ..."

179 At 11.12pm on 21 December, Mr Falkiner sent an email to McGrathNicol, copying Mr Araullo and Mr Ryan, seeking any feedback on the revised DOAD and attaching the latest version of the draft DOAD with comments marked from Mr Ryan and Mr Falkiner, in addition to the previous comments of others made on earlier drafts.

180 Various drafts of the DOAD and the advice were then exchanged between Messrs Falkiner and Ryan, McGrathNicol and Mr Oude-Vrielink from 22 December 2021 until 24 December 2021.

181 The advice was finalised on 24 December 2021. The final version of the DOAD was also provided by MinterEllison on 24 December 2021 and signed that day.

182 Below sets out what occurred, and the relevant changes to the draft DOAD and advice, each day from 22 December 2021 until the DOAD was signed.

22 December 2021

183 On the morning of 22 December 2021, Mr Smith sent an email to Messrs Falkiner, Wharton and Cohen, copying Mr Ryan and Mr Araullo attaching a further draft DOAD with his additional comments.

184 Mr Falkiner then sent an updated version of the DOAD to Mr Oude-Vrielink containing the combined marked-up amendments and additional comments from the Group and McGrathNicol. These changes and comments included the following, among others:

(a) In response to Recital E in the draft DOAD circulated by Mr Oude-Vrielink on 21 December 2021, which had stated that "the parties agreed that DASS would pay the costs and expense incurred by E&PO and this would result in the accrual of an Intercompany Debt" Mr Ryan commented:

> This is simply incorrect. DASS does not pay any of E&PO's expenses. E&PO and other subsidiaries collect revenue belonging to DASS (per recital B) – this is what creates the receivable. The point is that normally this is largely offset by the management fee payable to E&PO. It's [sic] suspension is why the Intercompany Debt increased, not any change in how E&PO's expenses were paid.

(b) Recitals D and E had been amended as follows:

> D. During FY21, DASS's expenses increased significantly particularly due to the recognition of various Claims provisions arising from regulatory proceedings, client complaints and related costs. As a result, E&PO's management decided to temporarily suspend the management fee for FY21.
>
> E. An unusually high Intercompany Debt has therefore arisen, whereby E&PO is indebted to DASS, specifically for the purpose of responding to the Claims and under the conditions in this Deed.

(c) Recital F (which had stated that "E&PO has separately undertaken to DASS to advance sufficient funds to DASS meet its liabilities arising out of regulatory proceedings and claims from customers") had been deleted in mark-up. Mr Ryan commented in response to Recital F: "No it has not. This reads like a blank cheque."

(d) Regarding the purpose of the DOAD set out in Recital G, Mr Smith commented: "**For Minter Ellison:** Should there be any acknowledgement that these terms were understood, but not documented, prior to issuance of this deed? We want to reduce the risk of this deed being set aside or discounted in the future."

(e) "Intercompany Debt" was now defined as:

> for the purposes of this Deed, agreed to be the amount owing by E&PO to DASS in relation to Claims totalling $19,608,267 as at 30 November 2021. The amount of Intercompany Debt does not include routine intercompany transactions.

Mr Falkiner commented in relation to this definition: "**Note:** we have redefined Intercompany Debt to refer to the amount owed in relation to Claims, as the remainder of the TOTAL intercompany balance relates to day-to-day routine transactions (such as receipt of revenue and management fees)".

(f) Regarding clauses relating to the satisfaction and automatic forgiveness of the Intercompany Debt, Mr Falkiner commented: "Can we include a qualifier that forgiveness can be waived by E&PO at its discretion and amend point of forgiveness to be end of financial year commencing from 30 June 2022 instead of the anniversary of the date of the deed (Minters to confirm if acceptable)".

(g) In response to a clause stating "The parties acknowledge E&PO has separately agreed that it will advance monies to DASS for the purposes of DASS satisfying its liabilities in relation to the ASIC Penalty and Costs, the AFCA Claims Payable and the Provisioned AFCA Claims", Mr Smith said: "There is no separate agreement for E&PO to advance further monies to DASS. Isn't this section referring effectively to repayment of the loan, being set off against the balance? Not sure it is required". Mr Falkiner commented "Propose removing this clause as we do not believe it is required. Any cash advancement for Claims would simply reduce the Intercompany Debt".

(h) Schedule 1 had been inserted into the DOAD which set out the "Particulars of Intercompany Debt" as follows:

Component	**Balance at 30 November 2021**
AFCA Claims Payable	$0
ASIC Penalty and Costs	$8,200,000.00
Provisioned AFCA Claims	$11,408,269.23
Intercompany Debt	**$19,608,269.23**

185 At 12pm, the Board of DASS (Messrs Ryan and Meaney) met and resolved to approve a draft revised constitution of DASS that was tabled at the meeting and to put the revised constitution to DASS's sole shareholder, EPO, for approval and adoption. The minutes of that meeting record that the Board of DASS resolved as follows:

> **Updates to the Constitution**
>
> A copy of a proposed revised Constitution of the Company (**Revised Constitution**) was tabled at the meeting.
>
> Consistent with the Constitutions of other subsidiaries of EP1 and in accordance with advice received from MinterEllison, it was proposed that the Constitution of the Company be amended, in the form of the Revised Constitution, to include a provision contemplated by section 187 of the *Corporations Act 2001* (Cth).
>
> The Board resolved as follows:
>
> (a) the Company approve the Revised Constitution and put the Revised Constitution to the sole shareholder of the Company for approval and adoption;
>
> (b) any Director or Company Secretary of the Company is authorised to take any action required to give effect to the above resolutions including but not limited to procuring that the sole member of the Company pass the required resolutions and making associated changes to the Company's records; and
>
> (c) it is in the best interests of the Company to approve the Revised Constitution and to put the Revised Constitution to the sole shareholder of the Company for approval and adoption.

186 At 3.30pm, Messrs Ryan, Falkiner, Smith and Oude-Vrielink held a conference call in which they reviewed the draft MinterEllison advice on entering into the DOAD. At 4.14pm, Mr Falkiner sent an email to Mr Oude-Vrielink attaching a marked-up version of the advice incorporating comments from Mr Ryan and Mr Falkiner. That email stated:

> Hi Bart,
>
> As discussed, please find attached a marked up version of the opinion with a few minor comments and changes. If you need any more details regarding our comments prior to making any final adjustments, please let me know.

187 In the attached draft advice, the paragraph which stated "Since 1 July 2020, DASS has also been meeting the costs and expenses of E&PO" had been deleted in mark-up. Regarding this paragraph, Mr Ryan had commented: "No, this whole concept is wrong and needs to be removed from the opinion and the deed".

188 Later, at 5.54pm, Mr Oude-Vrielink sent an email to Mr Falkiner and copied to Messrs Ryan, Araullo, Smith, Cohen and Wharton attaching a revised draft of the advice concerning the DOAD, which accepted the mark-up amendments from Messrs Ryan and Falkiner and made some additional amendments and comments.

189 At 4.23pm, Ms Grace Brennan, who held the role of Lawyer, Risk and Compliance for EP1, sent an email to Messrs Ryan, Hill and Araullo in their capacity as directors of EPO attaching the documents necessary to give effect to the amendments to the DASS Constitution. Those documents were a circular resolution of EPO; a resolution of sole member of DASS (to be executed by EPO); and the amended DASS Constitution.

190 Later that day, in their capacities as directors of EPO, Messrs Hill and Araullo electronically signed the resolution of sole member of DASS; and Messrs Hill, Araullo and Ryan passed the circular resolution to approve the adoption of the amended DASS Constitution.

191 Also the same day, Shine Lawyers filed a representative proceeding in the Federal Court on behalf of various group members against DASS, EP1and others. It was served on DASS after market close on 23 December 2021. Like the Piper Alderman class action, it related to losses suffered by clients as a result of financial advice provided by DASS to invest in the URF and related products.

23 December 2021

192 On 23 December 2021 at 9.21pm, Mr Oude-Vrielink sent an email to Mr Falkiner (copied to Messrs Ryan, Araullo, Smith, Cohen and Wharton) attaching a revised draft of the DOAD.

193 In response to Mr Smith's previous comment to MinterEllison asking whether there should be an acknowledgement that the terms of the DOAD were understood, but not documented, prior to issuance of the deed, MinterEllison included this comment in response in the updated draft: "We have inserted a recital to that effect. Please note that although such a term is helpful in recording the parties' intentions, it will not be conclusive and should any issues arise with the VA, E&PO would need to provide evidence of the prior understanding of the arrangement."

194 The new Recital H added by MinterEllison to the "Background" section read as follows:

> H For the avoidance of doubt, the parties agree that the terms set out in this Deed, particularly in relation to creation of the Intercompany Debt and the specific conditions on its repayment, were understood and agreed to by both parties but not relevantly documented prior to the creation of this Deed.

195 Mr Ryan reviewed the revised draft of the DOAD and worked with Mr Falkiner to mark up some further changes to it.

196 At 9.42pm, Mr Falkiner sent an email to Mr Oude-Vrielink (copying the others) attaching a further draft of the advice concerning entry into the DOAD stating:

> Hi Bart,

> Please find attached with information regarding the SMJLCM matter and one other change re: the amount of Intercompany Debt addressing your question below – we're otherwise comfortable with the document.

197 Also that evening, at 10.30pm, Mr Falkiner sent another email to Mr Oude-Vrielink, copying the others, attaching a marked-up version of the draft DOAD circulated by MinterEllison earlier that evening and incorporating Mr Falkiner and Mr Ryan's further comments. The email stated:

> Hi Bart,
>
> Thanks for your updates. There are two very minor changes in the attached (in 4(a) and rounding the itemised intercompany debt amounts).
>
> We will need to have this signed tomorrow as such, if there are any final comments from anyone, can you please let us know as soon as possible tomorrow morning.
>
> If not – Bart, could you please prepare a final version ready for signing tomorrow?

24 December 2021

198 At 8.07am on 24 December 2021, Mr Oude-Vrielink sent an email to Mr Falkiner copied to Mr Ryan and the others attaching a clean (and as it turned out, final) version of the DOAD.

199 At 9.20am, Mr Oude-Vrielink sent an email to Mr Falkiner (copied to Messrs Ryan, Araullo, Smith, Wharton and Cohen) attaching the final signed version of MinterEllison's advice. The final advice is set out below at [207].

200 At 10.51am Mr Ryan sent an email to the Group's in-house lawyers (Ms Brennan and Mr Mike Adams) requesting that they prepare the necessary circulating resolutions to resolve to enter into the DOAD; and an email to Messrs Araullo, Hill and Meaney (at 10.54am) providing them with a copy of the MinterEllison advice and the DOAD.

201 Later that day, Mr Adams sent emails to Messrs Ryan and Meaney (at 2.04pm), as directors of DASS, providing the circular resolution to be executed to authorise entry into the DOAD; and to Messrs Ryan, Araullo and Hill (at 2.06pm), as directors of EPO, providing the circular resolutions to be executed to authorise entry into the DOAD, with instructions as to the execution of those documents.

202 Shortly thereafter, Messrs Ryan, Araullo and Hill sent emails giving authority to affix their electronic signatures to the circular resolution of EPO to enter into the DOAD.

203 Later on 24 December 2021, Mr Meaney (at 3.45pm) and Mr Ryan (at 2.12pm) gave authority to affix their electronic signatures to the circular resolution of DASS to enter into the DOAD.

204 Just after 4pm, Ms Brennan sent an email to Messrs Ryan, Meaney, Hill and Araullo attaching signed copies of the resolution and the DOAD. The relevant terms of the final, executed DOAD are set out below at [208].

The three key documents

205 As I have just outlined, by 24 December 2021, the three documents which lie at the heart of this proceeding had been finalised, signed and executed. They are the amended DASS constitution, the MinterEllison advice, and the DOAD. The relevant parts of each final document are extracted below.

The amended DASS constitution

206 As a consequence of (a) Mr Ryan (and Mr Meaney) in their capacity as directors of DASS resolving to approve the revised constitution and to put it to EPO to approve and adopt and (b) Mr Ryan and the other EPO directors resolving to authorise the execution of DASS's resolution, from 22 December 2021, DASS's constitution included the following provision:

> **6.22 Wholly Owned Subsidiary**
>
> For so long as [DASS] is a Wholly-Owned Subsidiary in accordance with section 187 of the Act:
>
> (a) a Director is taken to act in the best interests of [DASS] if that Director acts in the best interests of a Holding Company of the Company; and
>
> (b) each Director is expressly authorised to act in the best interests of any Holding Company of the Company.

The MinterEllison advice

207 The signed version of the MinterEllison advice dated 24 December 2021 was addressed to Marc Falkiner, the Executive Director, Strategy & Operations. It was in these terms:

> **Subject: Proposed deed of acknowledgment of debt between E&P Ops and DASS**
>
> Hi Marc
>
> I refer to your email of 20 December 2021 and subsequent correspondence.
>
> **1. Background**
>
> 1.1 Our understanding and instructions regarding the relevant background facts are set out below. Our opinion below is based on the accuracy of the background stated, which we have not independently tested or verified.
>
> 1.2 Dixon Advisory & Superannuation Services Pty Ltd (DASS) and E&P Operations Pty Ltd (**E&PO**) are both wholly-owned subsidiaries of E&P Financial Group Limited (EP1).
>
> 1.3 As a financial services licensee, DASS produces and has audited its own stand-alone financial statements that must comply among other things with the AASB Accounting Standards.
>
> 1.4 DASS has incurred liabilities in connection with:
>
> (a) complaints by clients and former clients to the Australian Financial Complaints Authority (**AFCA**) and settlements and adjudications by AFCA following such complaints;
>
> (b) an in-principle settlement offer to resolve proceedings commenced against DASS in February 2021 by SMJLCM Pty Limited and others; and
>
> (c) a 'Heads of Agreement' dated 8 July 2021 between DASS and ASIC to settle ASIC's litigation in which DASS agreed to a pecuniary penalty of $7.2 million plus $1.0 million of costs, subject to the approval of the Federal Court.
>
> 1.5 DASS is also subject to other claims and legal proceedings made or instigated by (or on behalf of) existing and former clients arising as a result of allegations of conflicted advice provided by DASS and certain of its representatives to retail clients to invest in the US Masters Residential Property Fund (**URF**) and related party products.

1.6 As a result of those liabilities as well as the other claims and legal proceedings (collectively, **Relevant Liabilities**), there is a prospect that DASS may be placed into voluntary administration if its directors ultimately decide that DASS is insolvent or likely to become insolvent. However, as at the date of this email the directors of DASS have not made that decision and have not yet formed any view about the solvency or otherwise of DASS.

1.7 Among other things, DASS derives revenue through the provision of financial advisory services to mainly retail clients. In most instances, those clients are also provided services by another related body corporate of E&PO, with clients billed and proceeds received on DASS's behalf by E&PO and the other related body corporate, thereby creating a receivable to DASS from E&PO.

1.8 E&PO performs various intragroup functions, such as the employment of advisers, management of office leases and maintenance of IT systems, to enable DASS (as well as other EP1 group entities) to operate and service its clients. E&PO incurs costs and expenses in performing these services and typically charges DASS a management fee sufficient to reimburse those costs and expenses and provide a reasonable margin.

1.9 Due to a requirement under the AASB Accounting Standards for DASS to recognise in its financial statements provisions in respect of the Relevant Liabilities without capacity to recognise an insurance receivable in respect of those circumstances on the same basis, E&PO temporarily suspended the management fee in respect of the period that commenced 1 July 2020 and ended 30 June 2021. The management fee has been reinstated for the subsequent period.

1.10 Due to the above circumstances, particularly those described in paragraphs 1.7 and 1.9 … an intercompany debt has arisen which E&PO owes DASS. As at 30 November 2021, this intercompany debt amounted to $19,608,267 (**Intercompany Debt**). The parties agreed that the Intercompany Debt would accrue on the basis that repayment would only be required if and to the extent the Relevant Liabilities become payable by DASS and are not recoverable from insurance.

1.11 E&PO and DASS propose to enter into a Deed of Acknowledgement of Debt under which, among other things:

(a) E&PO will acknowledge its indebtedness to DASS in respect of the Intercompany Debt;

(b) record that the Intercompany Debt is interest-free and unsecured;

(c) limit the repayment of the Intercompany Debt so that the proceeds of repayment are applied solely to the discharge of the Relevant Liabilities, after the application of any insurance proceeds received by DASS in respect of those Relevant Liabilities; and

(d) any amount of the Intercompany Debt remaining outstanding after the permitted repayment of the Relevant Liabilities will be automatically forgiven,

(**Deed**). This memorandum relates to a draft of the Deed as it exists on the date of this letter (**Draft Deed**) and attached to my email to Marc Falkiner and others sent at 9.07am on that date.

1.12 The limitation of the purposes to which the proceeds of repayment of the Intercompany Debt may be applied, being the discharge, wholly or in part, of the Relevant Liabilities, formed part of the negotiations between DASS and E&PO when the temporary suspension of the management fee ordinarily charged to DASS by E&PO was put in place. The proposed Deed will acknowledge this.

2. Assumptions

We have assumed for the purposes of this memorandum:

(a) that currently DASS is solvent within the meaning of s95A of the Corporations Act;

(b) the Deed when executed is substantially in the form of the Draft Deed; and

(c) the accuracy and completeness of the Background above.

3. Summary

3.1 In our opinion, based on the above Background and subject to the above Assumptions, the directors of DASS should be justified and otherwise acting reasonably if they were to consider that causing DASS to execute the Deed would not involve a breach on their part of their duty to act in the best interests of DASS as long as, at the time of execution, the constitution of DASS included a provision of the type contemplated by s187 of the Corporations Act.

3.2 Reasons for our opinion follow.

4. Directors' duties

4.1 At general law directors owe a duty to their company a number of duties, including:

(a) to act in good faith in the company's best interests;

(b) to act for proper purposes;

(c) to act with reasonable care and diligence;

(d) to avoid a conflict of interest;

(e) not to make improper use of information; and

(f) not to make improper use of position.

4.2 The duty to act in good faith is one of the fundamental duties of company directors: *BCI Finances Pty Ltd (in liq) v Binetter* [2018] FCAFC 189 at [597]. Deciding what are the company's interests is an important business decision and (so Courts say), Courts do not generally substitute their view of business matters or the commercial merits of a decision for the view or the decision of the directors. However, directors' decisions are not immune from review by the Court. A Court may find a breach of duty if the decision of the directors is one that, according to the Court, no reasonable board of directors would judge to be in the interests of the company: *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* (2008) 39 WAR 1; 70 ACSR 1.

4.3 In short, the weight of authority holds that directors may breach their duty even if they are acting in what they genuinely consider to be an honest manner, because they have failed to give proper consideration to the interests of the company. Situations of this kind tend to arise when circumstances induce directors to believe that the company's interests correspond with their own interests or with the interests of some other person. Making that assumption, they then act in the company's affairs without considering its interests as a separate entity with its own shareholders and creditors.

4.4 Thus, a director of a company who causes the company to enter into an agreement, to make a payment or to confer a benefit (including by denying the company a benefit to which it is entitled)

to the director or a third party where the company itself does not derive any corporate benefit may be exposed to a finding that they have breached their duty of good faith, as well as potentially other duties, such as the duty not to make improper use of position.

4.5 As an example, in *Galladin Pty Ltd v Aimworth Pty Ltd (in liq)* (1993) 11 ACSR 23, several transactions of a proprietary company, Galladin (G) were found to be voidable on the basis that they were not in the best interests of G, namely:

(a) forgiveness of debts owed to G by a company and partnerships associated with a director of G;

(b) distribution of the proceeds of a sale of land owned by G outside the company in an attempt to avoid recovery by the receiver; and

(c) transfer of assets of the company (shares) also in an attempt to defeat recovery by the receiver.

4.6 In this context, the question that arises is the meaning of 'the interests of the company', specifically, who is the 'company'?

4.7 The answer in our view is that generally, the interests of the company refers to the shareholders as a whole, rather than the company as a commercial entity. Thus the consideration as to whether directors have complied with their duties involves a determination of whether the conduct diverged from the interests of the company's shareholders: *International Swimwear Logistics Ltd v Australian Swimwear Company Pty Ltd* [2011] NSWSC 488. However, that is not the end of the matter.

4.8 In recent years, Courts in Australia have developed the theory that in discharging their duty to act in good faith in the interests of the company, directors must have regard to the interests of the company's creditors when the company is insolvent, is facing insolvency (ie, a real and not remote risk of insolvency) or some contemplated transaction threatens the solvency of the company. The test in this context seems to be whether an intelligent and honest person in the position of the directors could not have reasonably believed that the transaction was for the benefit of the company having in mind the interests of the company's creditors: *ASIC v Sydney Investment House Equities Pty Ltd* (2008) 69 ACSR 1; [2008] NSWSC 1224, applying *Linton v Telnet Pty Ltd* (1999) 30 ACSR 465.

4.9 In this context:

(a) DASS has derived a corporate benefit from the Intercompany Debt and the temporary suspension of the management fee charged by E&PO; and

(b) the only substantive creditors of DASS are in respect of the Relevant Liabilities and clients who have prepaid for services provided by DASS, as all of the other creditors' claims incurred in the ordinary course of business of DASS are incurred and paid on a group basis by E&PO.

4.10 Despite this however, it may be appropriate, before the Deed is entered into, for the constitution of DASS to include a provision of the type provided in s187 of the Corporations Act. Section 187 provides that a director of a company that is a wholly-owned subsidiary of a body corporate is taken to act in good faith in the interests of the subsidiary if:

(a) the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company;

(b) the director acts in good faith in the best interests of the holding company; and

(c) the subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's act.

4.11 Typically s187 assists directors of a wholly-owned subsidiary causing the subsidiary to provide a guarantee for borrowings undertaken by its holding company even where there is no corporate benefit to the subsidiary from the provision of the guarantee.

4.12 In our view, and especially given our instructions that DASS is not insolvent, there may be some merit from the perspective of the directors of DASS for the constitution of DASS to include a provision of the type contemplated by s187, so that the DASS directors are not required to identify a corporate benefit for DASS arising from the Deed. Clearly from the perspective of EP1, there is a corporate benefit to EP1 from the Deed, being to ensure that the Intercompany Debt is properly applied to repay the Relevant Liabilities and for no other purpose. The same holds true from the perspective of E&PO. While there is likely also a corporate benefit from DASS' perspective, given the costs and expenses in connection with DASS' business that are incurred and paid by E&PO and the circumstances surrounding the temporary suspension of the E&PO management fee, it is less clear. The inclusion of a s187 provision therefore should assist in providing some additional protections for the DASS directors.

4.13 In our view, subject to the amendment to the constitution of DASS so as to include a s187 provision, the directors of DASS should be justified and otherwise acting reasonably if they were to take the view that the execution of the Deed by DASS was appropriate and in the best interests of DASS or EP1 as its holding company or both.

5. Benefit of letter

5.1 This letter is addressed to and may be relied on by E&PO and the directors as at the date of this letter of DASS (collectively and individually, Addressees) and may not, without our prior written consent, be:

(a) relied on by another person or for any purpose;

(b) disclosed, except to any persons who in the ordinary course of the business of an Addressee have access to its papers and records of the Addressee and then only on the basis that they will make no further disclosure; or

(c) filed with a government or other agency or quoted or referred to in a public document, except to the extent disclosure is required:

(d) by law or regulation;

(e) by the requirements of a regulatory authority;

(f) in connection with any actual or potential claim, investigation or inquiry involving an addressee or their representative in relation to the Deed; or

(g) by an Addressee to obtain legal advice from its legal advisers in relation to this letter or the Deed, in which case the Addressee must ensure that its legal adviser keeps this letter confidential,

and is given in respect of the laws of the Commonwealth of Australia which are in force at 9.00am on the date of this letter.

5.2 For the avoidance of doubt, this letter is not provided to and may not be relied on, by DASS.

We trust the above assists, but please do not hesitate to call if there are any follow up questions.

The DOAD

208 Relevantly, the DOAD (between DASS and EPO, called the parties) executed on 24 December 2021 provided as follows:

Background

A The parties are related bodies corporate with a common ultimate holding company. The parties have historically engaged in regular intercompany transactions between them, which are recorded by way of an intercompany loan account.

B DASS generates revenue through the provision of financial advisory services to clients. In most instances those clients are also provided services by another subsidiary of [EPO], with clients billed (and cash received) on DASS's behalf by [EPO] or the other subsidiary. This creates a receivable to DASS from [EPO].

C At the same time, [EPO] performs various intragroup functions (e.g. employment of advisers, management of office leases and maintenance of IT systems) to enable group entities such as DASS to operate and service their respective clients. In doing so, [EPO] incurs certain costs and expenses and therefore charges DASS a management fee (equivalent to 90% of DASS's gross revenue) to collect sufficient funds to satisfy its costs and expenses.

D During FY21, DASS's expenses increased significantly particularly due to the recognition of various Claims provisions in its financial statements arising from regulatory proceedings, client complaints and related costs. As a result, [EPO's] management decided to temporarily suspend charging the management fee for FY21.

E As [EPO] has been collecting revenue belonging to DASS and that has not been offset by the management fee, an unusually high Intercompany Debt has therefore arisen, whereby [EPO] is indebted to DASS specifically for the purpose of responding to the Claims.

F The purpose of this Deed is to:

(i) acknowledge and record the agreement of the parties as to the terms upon which [EPO] owes the Intercompany Debt to DASS; and

(ii) record the agreement of the parties as to the terms on which DASS may call upon [EPO] to repay the Intercompany Debt.

G [EPO] and DASS have agreed to satisfaction of the Intercompany Debt in accordance with the terms of this Deed.

H For the avoidance of doubt, the parties agree that the terms set out in this Deed, particularly in relation to creation of the Intercompany Debt and the specific conditions on its repayment, were understood and agreed to by both parties but not relevantly documented prior to the creation of this Deed.

…

1.1 **Defined terms**

In this Deed:

…

AFCA Claims Payable means AFCA claims that have been settled by negotiation with the claimant by way of a Deed of Release signed by the claimant or have received a final determination from AFCA and are due and payable. These are recorded by DASS in its Statement of Financial Position in the amount of $0 as at 30 November 2021.

…

ASIC Penalty and Costs means the 'Heads of Agreement' dated 8 July 2021 between DASS and ASIC to settle ASIC's litigation in which DASS agreed to a pecuniary penalty of $7.2 million plus $1.0 million of costs, subject to approval by the Federal Court of Australia.

…

Claims means AFCA Claims Payable, ASIC Penalty and Costs and Provisioned AFCA Claims.

Deed means this Deed of Acknowledgment of Debt including its schedules except where the context otherwise requires.

EP1 Group means E&P Financial Group Limited and its controlled entities.

Intercompany Debt is, for the purposes of this Deed, agreed to be the amount owing by [EPO] to DASS in relation to Claims totalling $19,608,267 as at 30 November 2021 but does not include routine intercompany transactions. See Schedule 1 for particulars regarding the amount of the Intercompany Debt payable.

Provisioned AFCA Claims means AFCA claims (and certain internal dispute resolution claims that have not yet reached AFCA stage but are expected to proceed to AFCA) that have not yet settled or have not received a final determination from AFCA and are not due nor payable and are provided for accounting purposes. These are recorded by DASS in its Statement of Financial Position in the amount of $11,408,267 as at 30 November 2021.

…

2. Acknowledgment of Intercompany Debt

(a) [EPO] acknowledges that, subject to the terms of this Deed, it owes the Intercompany Debt to DASS as a result of the following transactions:

(i) revenue that DASS has generated is billed and received by [EPO] and another of its subsidiaries on behalf of DASS – this creates a receivable to DASS from [EPO]; and

(ii) DASS accruing liabilities with respect to the Claims which necessitated [EPO] temporarily suspending charging DASS a management fee ordinarily payable for the 12 month period ended 30 June 2021.

(b) [EPO] acknowledges that the net effect of the abovementioned transactions has been recorded as a receivable recognised in DASS's Statement of Financial Position as at 30 June 2021 and on an ongoing basis as at the date of this Deed.

(c) Accordingly, [EPO] is indebted to DASS for the Intercompany Debt.

(d) DASS acknowledges that the Intercompany Debt is unsecured and non-interest bearing.

3. Intercompany Debt payment terms

3.1 Requirement to repay

(a) Subject to clause 3.2, the parties agree that Intercompany Debt will only be repayable by [EPO] to DASS after one or more of the following circumstances have occurred:

(i) the ASIC Penalty and Costs becoming due and payable by DASS as determined by a court;

(ii) the AFCA Claims Payable and associated legal and AFCA fees becoming due and payable by DASS via Deeds of Release signed by the relevant claimants or in accordance with the relevant AFCA process; and

(iii) the Provisioned AFCA Claims being settled by negotiation with the relevant claimant (by way of Deed of Release signed by the claimant) or upon final determination from AFCA and thereby becoming due and payable.

(b) The parties agree that if any Intercompany Debt becomes repayable, the amount to be repaid shall be determined in accordance clause 3.3.

3.2 Insurance claims

(a) Before [EPO] is required to make any repayments to satisfy any Intercompany Debt, DASS must seek to recover any part of the relevant penalties, costs and claims noted in this Deed from insurance policies it or the EP1 Group holds (such as but not limited to professional indemnity insurance) wherever possible.

(b) Any repayment of the Intercompany Debt under this Deed will be due and payable only when proceeds of insurance in respect of the relevant Claim have been received by [EPO] or DASS.

3.3 Repayment amounts

The parties agree that if any of the Intercompany Debt is repayable because the circumstance in:

(a) paragraph 3.1(a)(i) arises, [EPO] is not required to make a repayment that exceeds the amount of the ASIC Penalty and Costs that is then due and payable by DASS, less the amount of any insurance recoveries in respect of the ASIC Penalty and Costs;

(b) paragraph 3.1(a)(ii) arises, [EPO] is not required to make a repayment that exceeds the amount of the AFCA Claims Payable and associated legal and AFCA fees that is then due and payable by DASS, less the amount of any insurance recoveries in respect of the AFCA Claims Payable; and

(c) paragraph 3.1(a)(iii), [EPO] is not required to make a repayment that exceeds the amount of the Provisioned AFCA Claims that is then due and payable by DASS, less the amount of any insurance recoveries in respect of the Provisioned AFCA Claims.

3.4 Satisfaction of Intercompany Debt

(a) After [EPO] has made all required payments under clause 3.3, the Intercompany Debt is deemed to be satisfied, whether or not the required payments equal or are less than the amount of the Intercompany Debt acknowledged under this Deed.

(b) Upon satisfaction of the Intercompany Debt in accordance with clause 3.4(a), DASS agrees that [EPO] will not have any further liability to pay any amounts in respect of the Intercompany Debt.

(c) For the avoidance of doubt, [EPO] will not under any circumstances be required to make a payment under clause 3.3 if the payment, when aggregated with all previous payments under that clause, would cause all payments made under that clause to exceed the amount of the Intercompany Debt acknowledged under this Deed.

3.5 Automatic forgiveness

(a) By force of this clause 3.5, DASS forgives, and releases [EPO] from all liability and claims whatsoever in respect of, all Intercompany Debt remaining outstanding if [EPO] issues a notice to DASS within 7 Business Days before any 30 June after the date of this Deed confirming that the Intercompany Debt is to be forgiven. That is, no later than 7 Business Days before any 30 June after the date of this Deed, [EPO] may serve a 'forgiveness notice' on DASS. Upon receipt of that notice, then by force of this clause DASS immediately forgives the Intercompany Debt outstanding.

(b) DASS agrees that [EPO] will not have any liability whatsoever to pay any amounts in respect of the Intercompany Debt that DASS forgives under this clause 3.5.

(c) [EPO] may plead this clause 3.5 as an absolute bar to any claim by or on behalf of DASS in respect of any Intercompany Debt forgiven under this clause 3.5.

4. Other intercompany transactions and right of set-off

(a) The parties routinely engage in other intercompany transactions such as allocation of revenue, charging of management fees and other costs, and cash transfers.

(b) The parties agree that, at the election of either party, any funds or amounts due and payable by DASS to [EPO] may be, wholly or in part, used to set off against any amounts that are due and payable by [EPO] to DASS on any account whatever (such as, but without limitation, against [EPO's] obligation to repay the Intercompany Debt).

(c) Repayment of the Intercompany Debt by way of set off as provided in clause 4(b) is a good discharge of [EPO's] obligation to pay or repay the amounts of Intercompany Debt set off and only the balance (if any) of any Intercompany Debt (if any) remains payable by [EPO] as and when it falls due.

…

Schedule 1 – Particulars of Intercompany Debt

Component	**Balance at 30 November 2021**
AFCA Claims Payable	$0
ASIC Penalty and Costs	$8,200,000.00

Provisioned AFCA Claims	$11,408,267.00
Intercompany Debt	$19,608,267.00

209 Mr Ryan agreed in cross-examination that he was aware the subject matter of the DOAD was the $20 million receivable between the holding company and DASS and that he knew that there were clauses in it that would cause that receivable to be extinguished, satisfied or reduced to nil in certain circumstances.

2022: Voluntary administration of DASS

210 On 17 January 2022, Mr Anderson prepared a memorandum, with Mr Ryan's assistance, addressed to the EP1 Board recommending the appointment of voluntary administrators to DASS. The memorandum said, among other things:

> In light of the cumulative effect of recent developments including: i) the filing of a second URF related class action against DASS by Shine Lawyers; ii) AFCA confirming that it will continue to both make adverse findings in relation to URF claims and use the whole of portfolio loss calculation methodology to determine damages; iii) ongoing civil proceedings against DASS in relation to URF; and iv) the mounting cost of managing and defending all of these claims, EP1 Management and the DASS directors have determined that DASS is likely to become insolvent at some future point in time. It is therefore both appropriate and necessary for the directors of DASS to appoint voluntary administrators to DASS forthwith.
>
> While DASS is currently solvent (noting the McGrath Nicol solvency report dated 25 October 2021 which is re-attached, the fact that the most significant creditor claims are contingent only at this stage, the most recent positive net tangible asset (NTA) calculations performed for the purpose of AFSL obligations, the existence of responding insurance cover and EP1's ongoing financial support), EP1 Management and the DASS directors believe that DASS is likely to become insolvent at some future point in time due to the aforementioned escalating existing and potential liabilities relating to URF.
>
> The possible magnitude of these respective claims are as follows:
>
> - agreed regulatory penalties and ASIC legal costs of $8.2 million payable subject to court approval;
>
> - approximately 75 claims currently under assessment by the Australian Financial Complaints Authority (AFCA), with up to $18.5m estimated liability (based on AFCA's preferred whole of portfolio loss calculation methodology);
>
> - representative proceedings led by Piper Alderman and Shine Lawyers in relation to which total estimated exposure could be up to $475m - $946m); and
>
> - Legal proceedings brought by Maurice Blackburn on behalf of individual clients with large SMSF balances (currently one $900k claim on foot but information has been requested on behalf of 6 other clients in the past 2 months).
>
> …
>
> **Key objectives**

The voluntary administration has two key objectives, being to:

1. facilitate the prompt transfer of DASS clients to a replacement service provider of the client's choice with minimal disruption to client service; and

2. sponsor a DOCA which provides for the comprehensive settlement of all DASS and related claims in a manner which provides for equitable treatment of all DASS clients/creditors.

211 The memorandum also stated that management was seeking approval from the EP1 Board of the resolutions relating to the following:

a. Support for the directors of [DASS] to resolve to appoint voluntary administrators to DASS;

b. Confirm the provision of support to DASS in accordance with the attached commitment letter from EP1 to DASS; and

c. Confirm EP1's commitment to voluntarily contribute $8.2 million towards a Deed of Company Arrangement (DOCA) on the proviso that this incorporates a comprehensive resolution of all DASS client claims and legal proceedings, including the class actions against EP1, DASS and other respondents.

212 On 18 January 2022, Mr Anderson presented the memorandum to the EP1 Board at a meeting. At that meeting the Board resolved that:

(a) The form of the commitment letter be approved;

(b) Subject to the appointment by DASS of PwC administrators, Mr Anderson be authorised to make any non-substantial amendments to the commitment letter and to sign and deliver the commitment letter to PwC on behalf of the company;

(c) Mr Anderson be authorised and instructed to propound and negotiate a DOCA with the voluntary administrators of DASS, with the form of the DOCA to be referred back to the directors for final approval.

213 On 19 January 2022, the Board of DASS (being Messrs Ryan and Meaney) unanimously resolved that:

(a) in the opinion of the directors, [DASS] is likely to become insolvent at some future time and that voluntary administrators should be appointed to the Company pursuant to Section 436A of the Corporations Act 2001 (**Act**);

(b) the Company appoint Stephen Longley and Craig Crosbie of PricewaterhouseCoopers, 2 Riverside Quay, Southbank, VIC 3006, as Joint and Several Administrators pursuant to Section 436A of the Act;

(c) the Company execute an Instrument of Appointment of Joint and Several Administrators in accordance with Section 127 of the Act;

(d) the Company authorise any two officers of the Company to execute those of the Documents that are to be signed by the Company to give effect to the above resolutions and to make any necessary changes to the Company's records and any consequential filings, and notifications; and

(e) it is in the best interests of the Company to approve and pass the above resolutions.

214 Mr Longley and Mr Crosbie were appointed as voluntary administrators of DASS that same day.

215 Subsequently, DASS's AFSL was suspended; and the creditors of DASS voted in favour of executing a DOCA on 16 December 2022.

216 The DOCA required EP1 and EPO to contribute over $21.6 million (less the settlement adjustments) plus (a) the balance of any insurance proceeds recovered by EP1 from the insurer under the insurance policy as part of the settlement of the Piper Alderman class action and the Shine Lawyers class action; and (b) certain tax receivables payable by EP1 in FY2022 and FY2023.

THE LAW

217 ASIC's case relied on three provisions of the Act.

218 First, s 180(1). It 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.

219 Secondly, s 181(1)(a). It relevantly requires a director to exercise their powers and discharge their duties in good faith in the best interests of the corporation.

220 Thirdly, s 182, which provides that directors must not improperly use their position to gain an advantage for themselves or someone else; or cause detriment to the corporation.

221 In his defence, Mr Ryan relied on the business judgment rule, as it is set out in s 180(2) of the Act, viz:

> (2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
>
> (a) make the judgment in good faith for a proper purpose; and
>
> (b) do not have a material personal interest in the subject matter of the judgment; and
>
> (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
>
> (d) rationally believe that the judgment is in the best interests of the corporation.
>
> The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.
>
> (3) In this section:
>
> ***business judgment*** means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

222 Mr Ryan also relied on s 189 in his defence. It provides:

> If:

(a) a director relies on information, or professional or expert advice, given or prepared by:

(i) an employee of the corporation whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or

(ii) a professional adviser or expert in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence;

(iii) another director or officer in relation to matters within the director's or officer's authority; or

(iv) a committee of directors on which the director did not serve in relation to matters within the committee's authority; and

(b) the reliance was made:

(i) in good faith; and

(ii) after making an independent assessment of the information or advice, having regard to the director's knowledge of the corporation and the complexity of the structure and operations of the corporation; and

(c) the reasonableness of the director's reliance on the information or advice arises in proceedings brought to determine whether a director has performed a duty under this Part or an equivalent general law duty;

the director's reliance on the information or advice is taken to be reasonable unless the contrary is proved.

223 Section 187 of the Act is also relevant. As noted above, it provides:

Directors of wholly-owned subsidiaries

A director of a corporation that is a wholly-owned subsidiary of a body corporate is taken to act in good faith in the best interests of the subsidiary if:

(a) the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company; and

(b) the director acts in good faith in the best interests of the holding company; and

(c) the subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's act.

224 Mr Ryan contended that his conduct did not contravene s 180(1) because he reasonably relied on MinterEllison's advice (as well as advice provided by McGrathNicol and Mr Anderson) in making a business judgment protected by the business judgment rule in s 180(2). He also invoked s 189 and contended that because he relied on expert advice in good faith and satisfied the other criteria of the provision, he also satisfies the business judgment rule in s 180(2), and is taken thus to have met the requirements of s 180(1) in that way as well.

225 Mr Ryan also contended that ASIC's case in respect of s 182 was not made out, because Mr Ryan's use of power, being for a purpose expressly authorised by DASS's constitution, was not "improper" within the meaning of that provision.

226 In any event, as I have explained, ASIC's ultimate case was that the answer to its case turned on the answers to the sixteen factual findings posited.

227 For the most part, Mr Ryan said that the findings should not be made.

228 The sixteen findings ASIC contended for were as follows:

(1) **First Finding:** From at least July 2021, DASS was facing a real and not remote risk of insolvency and that risk increased throughout the period to January 2022, particularly from 18 August 2021 when DASS was informed of the imminent Piper Alderman class action.

(2) **Second Finding:** The discussions which occurred between Mr Ryan and Mr Anderson in July, August or early September over the telephone comprised no more than a concept without any real detail: a concept that Mr Anderson was not willing to agree to an unconditional transfer of resources to DASS (by EPO waiving the management fee) and that Mr Ryan should take steps to resolve the issue.

(3) **Third Finding:** There was no negotiation, at all, between DASS and EPO in relation to the waiver of the management fee at the time the management fee was waived. The fee was waived in order to permit DASS to satisfy the solvency condition of DASS's AFSL.

(4) **Fourth Finding:** The conditions imposed on the intercompany receivable, as ultimately reflected in the DOAD, were developed throughout November and December 2021 when the Project Fork team undertook the task of documenting an agreement in respect of the intercompany loan.

(5) **Fifth Finding:** By execution of the DOAD, an approximately $19 million asset of DASS was then impaired, for the benefit of EPO, and with no quid pro quo in favour of DASS.

(6) **Sixth Finding:** As at Monday 20 December 2021, when advice from MinterEllison was requested, there was no realistic prospect that Mr Ryan would not resolve in favour of executing the DOAD.

(7) **Seventh Finding:** The MinterEllison advice was sought to protect the directors of DASS and did not inform their decision-making.

(8) **Eighth Finding:** MinterEllison did not recommend that the directors of DASS amend the constitution.

(9) **Ninth Finding:** Mr Ryan did not consider the interests of DASS's creditors, alternatively, give due consideration to the interests of DASS's creditors, on 22 December 2021 when resolving to amend DASS's constitution. In fact, the animating or motivating motive of Mr Ryan, to different effect, was to create for himself a legal justification to support entering into the DOAD a few days later.

(10) **Tenth Finding:** Mr Ryan knew that, if the amendment to the constitution was not attended to, the directors of DASS could not justify that entering into the DOAD was in the interests of DASS.

(11) **Eleventh Finding:** The DOAD was not, as a matter of fact, in the interests of DASS.

(12) **Twelfth Finding:** Continuing Group support for DASS's clients in a voluntary administration was not a consideration Mr Ryan had regard to in determining to execute the DOAD.

(13) **Thirteenth Finding:** MinterEllison's assumption that the background facts set out in its advice were accurate and complete was incorrect as:

(a) DASS and EPO had <u>not</u> agreed that the Intercompany Debt would accrue on the basis that repayment would only be required if and to the extent the relevant liabilities become payable by DASS and were not recoverable from insurance; and

(b) The limitation of the purposes to which the proceeds of repayment of the Intercompany Debt may be applied, being discharge wholly or in part, of the relevant liabilities, had not formed part of the negotiations between DASS and EPO when the temporary suspension of the management fee was put in place.

(14) **Fourteenth Finding:** Mr Ryan understood, on 24 December 2021, that the advice MinterEllison provided him was based on the accuracy and completeness of the background facts. Mr Ryan knew, or at the very least was wilfully blind, that one or two of the assumptions set out in the background facts were inaccurate or incomplete.

(15) **Fifteenth Finding:** The MinterEllison advice did not assist Mr Ryan in managing the conflict of interest inherent in his position as a director of DASS, director of EPO and the Group Chief Financial Officer.

(16) **Sixteenth Finding:** Any reliance by Mr Ryan on the MinterEllison advice was unreasonable.

229 I will consider each proposed finding in turn.

CONSIDERATION

First Finding sought by ASIC: From at least July 2021, DASS was facing a real and not remote risk of insolvency and that risk increased throughout the period to January 2022, particularly from 18 August 2021 when DASS was informed of the imminent Piper Alderman class action

230 Mr Ryan did not dispute the first finding sought, but sought to add the caveat that the risk of insolvency was "not imminent … until the very end" – that is, until 24 December 2021. It was not explained to me why the qualification mattered. In those circumstances, and given the concession made by senior counsel for Mr Ryan, I find that from at least July 2021, DASS was facing a real and not remote, risk of insolvency and that risk increased throughout the period to January 2022.

Second Finding: The discussions which occurred between Mr Ryan and Mr Anderson in July, August or early September over the telephone, which in evidence Mr Ryan referred to as an 'understanding', comprised a concept without any real detail: a concept that the Group was not willing to agree to an unconditional transfer of resources to DASS by agreeing to waive the management fee and that Mr Ryan should take steps to resolve the issue

231 This issue matters because ASIC contended that clause 1.10 of the MinterEllison advice was, to Mr Ryan's knowledge, not accurate (because there was to his knowledge no "agreement" of the type contemplated in that clause).

232 ASIC accepted that Mr Ryan "presented as a sophisticated, thoughtful and exceptionally well-prepared witness, who made numerous concessions", which it agreed was "to his credit as a witness".

233 It sought to contend, however, that "a close analysis of his affidavit and oral evidence, assisted by the contemporaneous documents, leads to an inevitable conclusion that a portion of his evidence … is unreliable".

234 That portion is the evidence he gave about his conversation with Mr Anderson.

235 ASIC contended that his evidence about that matter "no doubt in part because of the effluxion of time … the lack of contemporaneous records … [and] a reflex [by Mr Ryan] to the case that ASIC brings; and a necessary re-evaluation, accordingly, on the conduct and decision making in play in the litigation", meant that I should not accept his evidence in cross-examination, the gist of which is captured here:

> And did you discuss that the thing to be documented was to impose a condition on the otherwise recoverability of the receivable?---It was implicit in the discussion with Mr Anderson that the receivable balance was left that high because of those provisions. If those provisions never fell due and payable or insurance responded, the effect was that the receivable should drop away because the group would not otherwise agree to it - - -
>
> And so - - -?--- - - - being that high.

> I'm sorry. Did you understand Mr Anderson to be discussing with you that the receivable was only to be called upon to pay if necessary an ASIC penalty [and] the AFCA claims?---With the exception of the BAU transactions, yes.
>
> Do you accept that that was a substantial condition on the recoverability of the receivable?---Yes, just as it would have been a substantial imposition on the group to leave the receivable that high.

236 ASIC submitted that Mr Ryan's evidence in his affidavit, which did not refer to any specific conditions being discussed during the conversation, was more reliable, for the following reasons:

> The clues in the events which occurred after the conversation, in September and in early November, strongly indicate that the "understanding" reached by Mr Ryan and Mr Anderson was as to a broad concept, only. Mr Anderson accepted that the management fee had to be waived and he told Mr Ryan to ensure that the ensuing increase in the balance of the intercompany receivable was dealt with in documentary form.
>
> Those clues include the following: the imposition of limitations (and to be clear: substantial limitations) on the intercompany receivable were not mentioned in any correspondence until McGrathNicol circulated a draft description of key terms of a "loan agreement" on 10 November 2021, were not communicated to McGrathNicol before 8 November 2021, were not referenced in any iteration of the Management Fee Memorandum, were not conveyed to Deloitte, were not referenced in Note 9 to the company's accounts, and were not referenced in the accounts of E&P Ops. The first time conditionality was referred to in writing was in a Project Fork planning document dated 25 October 2021…, however, even that was in respect of a new loan rather than the intercompany receivable. On the record, Mr Ryan points to no document in advance of a conversation about which he gives evidence, which took place on 8 November 2021. All clues before that date, on conditionality, are one way.
>
> Developing that point further, despite having carriage of Project Fork and working closely with McGrathNicol on all aspects of the contingency planning, Mr Ryan conceded that he did not mention the substance of his discussion with anyone at McGrathNicol until a telephone conference on 8 November 2021... Mr Ryan's evidence in that regard is clear:
>
> > Did you at any point between the discussion with Mr Anderson and 8 November tell representatives of McGrathNicol the substance of the discussion?---Not that I recall.

237 Further, ASIC submitted that Mr Anderson's evidence did not suggest that the version of his conversation with Mr Ryan to which Mr Ryan had deposed in his affidavit was inaccurate. Mr Anderson gave the following evidence about the conversation:

> I said to him that he needed to go and document the arrangement by which the intercompany receivable balance was increasing so as to make it clear that this was a bridging mechanism by which the Group was providing financial support to DASS. I said that we both knew that the AFCA claims were to be paid by insurance and that there was no scenario in which the Group would agree to put cash into DASS to cover those claims just because of the timing difference in the accounting standards. I said that I did not want a transfer of wealth from the Group to DASS in circumstances where DASS was loss-making, being propped up by the Group, and at risk of voluntary administration, because this would be at the expense of the EP1 shareholders, which would not be fair on them. Mr Ryan responded that he understood and would take steps to arrange the documentation.

238 Senior counsel for ASIC explained why this mattered to its case as follows:

> If your Honour … concludes that it wasn't in that call that extinguishment or satisfaction occurred, at least three things follow from that – at least three. One is, your Honour should try on the record to work out when that element was injected, and in our submissions, we say it was injected by McGrathNicol on 25 October, and that's probably correct. Secondly, … your Honour should look at all of the things that occurred in the next month or two involving Mr Ryan, all of which are inconsistent with an extinguishment, and ask why Mr Ryan allowed those acts and omissions to occur if he had reached an undertaking on an extinguishment, and then thirdly, and this is just central to the case, where clause 1.10 of the Minters advice speaks of an agreement around an extinguishment, Mr Ryan couldn't possibly have thought in advance of the deed being entered into that that had been agreed, and to the extent he suggested to your Honour otherwise in evidence, he shouldn't be accepted on it.

239 Senior counsel for Mr Ryan accepted that "it's not unreasonable for ASIC … to suggest that there might be, as there nearly always is, some degree of re-synthesis of a story by a witness honestly trying to do his best to give evidence before your Honour some time after the event". Nor did he dispute ASIC's contention that Mr Ryan's evidence in cross-examination was more "evolved". But as ASIC itself accepted, Mr Ryan was (otherwise, in its submission) an honest and reliable witness. As ASIC's senior counsel put it in his closing address: "Mr Ryan has said to you honestly and truthfully and responsibly – he wasn't, for the most part, evasive on my questions. He was – made lots of concessions … he sought to usually, reliably, and broadly we say honestly, tell your Honour what occurred".

240 I am unpersuaded that Mr Ryan was in any relevant respect "evasive" or unreliable.

241 Having observed Mr Ryan in the witness box over a period of two days, I formed the view, as ASIC itself conceded for the most part, that Mr Ryan presented as a sophisticated, thoughtful and well-prepared witness.

242 In my view, Mr Ryan was a truthful witness. He did his best to say what he recollected about his conversation with Mr Anderson, without self-serving elaboration. And I have no hesitation in accepting his oral evidence, in particular, that he believed that he and Mr Anderson had both understood that it should be "documented" that the receivable would "drop away" once the ASIC penalty and the AFCA claims were met.

243 A commercial lawyer might think that language to be inexact, but they would surely understand the gist of it to be not inconsistent with the language in clause 1.10 of the DOAD ("The parties agreed that the Intercompany Debt would accrue on the basis that repayment would only be required if and to the extent the Relevant Liabilities become payable by DASS and are not recoverable from insurance").

244 ASIC submitted that Mr Anderson was less clear than Mr Ryan in his recollection of the conversation, in his first four answers in cross-examination set out at [114] above, but in my view the rest of the cross-examination reveals that Mr Anderson did not have a relevantly different recollection of the conversation.

245 For those reasons, I decline to make the second finding.

Third Finding: There was no negotiation, at all, between DASS and EPO in relation to the waiver of the management fee at the time the management fee was waived. The fee was waived in order to permit DASS to satisfy the solvency condition of DASS's AFSL.

246 This issue matters because ASIC contended that clause 1.12 of the MinterEllison advice was, to Mr Ryan's knowledge, not accurate, because the limitation of the purposes to which the proceeds of repayment of the Intercompany Debt were to be applied did not to his knowledge "form[] part of the negotiations between DASS and EPO" contemplated in that clause.

247 As would be apparent from what I say about the second finding, I do not accept ASIC's contention that there "was no negotiation at all".

248 It is clear from the evidence given by Mr Ryan and Mr Anderson about their conversation, which I have accepted, that their discussions are capable of being described as constituting "negotiations", in the ordinary English meaning of that word. As Mr Wallis put it "in the context in which the word negotiations is used in that advice, what passed between Mr Ryan and Mr Anderson would reasonably be seen, we say, by a person in Mr Ryan's shoes reading this advice months later, that there was a form of negotiation".

249 For those reasons, I decline to make the third finding.

Fourth Finding: The conditions imposed on the intercompany receivable, as ultimately reflected in the DOAD, were developed throughout November and December 2021 when the Project Fork team undertook the task of documenting an agreement in respect of the intercompany loan.

250 Mr Ryan accepted that "to some extent" the specific conditions that ultimately made their way into the deed were developed throughout November and December with the input of advisers, but he made the point – correctly in my view – that it is hardly surprising that that should have occurred. As his senior counsel put it:

> And, your Honour, again, trying to look at this from a commercially, we say, realistic perspective, your Honour only needs to look at the ultimate deed to see that it's quite a complex legal document that needed to be carefully thought through and articulated in the way that it ultimately was.
>
> And any, we would say, reasonable legal advisor who was told there's only an oral understanding or oral agreement about the matters that ultimately made their way into the deed would understand that the conversation is going to be at a more conceptual level and not as precise as the deed that's ultimately envisaged. And bearing in mind the whole premise of the conversation was that – and what we say was understood in Mr Ryan's defence – was that there was a discussion, and the outcome was that Mr Ryan would go away, sit down with the lawyers and document it. So any reasonable person coming back to Mr Ryan at the end, reading an advice from a trusted lawyer who understands that there was only an oral conversation that founded what became the deed, would expect that the lawyer understood that there must be some development and refinement of the concepts when the deed ultimately is prepared, and that one would not expect an entirely precise correlation between what was said in the discussion and the final form of the deed.

251 In those circumstances it seems to me wholly unsurprising that the draft of the DOAD would develop over the course of November and December, including by the inclusion of Recital H in the 23 December MinterEllison draft, which read:

> For the avoidance of doubt, the parties agree that the terms set out in this Deed, particularly in relation to creation of the Intercompany Debt and the specific conditions on its repayment, were understood and agreed to by both parties but not relevantly documented prior to the creation of this Deed.

(It will be recalled that that recital was included following Mr Smith's query of MinterEllison the day before "Should there be any acknowledgement that these terms were understood, but not documented, prior to issuance of this deed?").

Fifth Finding: By execution of the DOAD, an approximately $19 million asset of DASS was then impaired, for the benefit of EPO, and with no quid pro quo in favour of DASS.

252 As I understand it, in the context of generally accepted accounting principles, the word "impaired" means, or can mean, that the value of an asset has decreased. ASIC did not seek any finding by reference to any accounting standard. In the absence of any evidence from ASIC about it, and in circumstances where the relevance of the finding about "impairment" to the issues in this case was never explained, I need not say anything further about the point.

253 Further, ASIC's written closing made no mention of the "and with no quid pro quo in favour of DASS" sought to be added to the finding.

Sixth Finding: As at Monday 20 December 2021, when advice from MinterEllison was requested, there was no realistic prospect that Mr Ryan would not resolve in favour of executing the DOAD.

254 ASIC contended that the sixth finding should be made because:

(1) Mr Ryan had a history of taking steps to reduce the intercompany receivable without legal advice;

(2) had Mr Ryan "seriously been contemplating" not resolving in favour of executing the DOAD, he would have raised the prospect with the Project Fork team, McGrathNicol and/or MinterEllison during the drafting process; and

(3) given that the intercompany receivable was such a key aspect of Project Fork, it can be inferred that Mr Ryan would have sought advice from MinterEllison much earlier than 20 December 2021 if he had actually contemplated not resolving in its favour.

255 These submissions cannot be accepted.

256 First, as I have already found, Mr Ryan believed that he and Mr Anderson had both understood (from no later than September 2021) that it should be "documented" that the receivable would "drop away" once the ASIC penalty and the AFCA claims were met. Such an understanding obviously implies the involvement of lawyers in doing so and providing necessary legal advice in that regard.

257 Secondly, it is not correct to say that advice was not sought from MinterEllison until 20 December 2021. The first written instruction to that firm in respect of documenting the DOAD occurred on 11 November. In an email to Mr Oude-Vrielink from Mr Falkiner, copied inter alios to Mr Ryan, Mr Falkiner instructed MinterEllison in these terms:

> Hi Bart,
>
> As discussed on Monday's call, we have drafted a summary set of terms (attached) relating to the intercompany loan arrangement between DASS and E&P Operations for your review and input. The terms refer to two other documents which are also attached for your reference (we note that the Memo contains a summary of management fee methodology for FY21 and the waiver of the management fee for DASS in FY21).
>
> Also attached for your reference are the relevant EP1 and DASS resolutions (from June 2021) regarding the provision of financial support to DASS for the ASIC settlement. These documents refer to the * 'Maximum Amount', which is defined (in the Proposed Resolutions) to mean ' ... terms of a settlement of the Proceeding at or following on from the Mediation within the parameters set out in the Summary, including a penalty amount up to an overall maximum of $10 million'.
>
> We are seeking your advice on the following:
>
> a. a. **drafting any additional technical/legal terms of the intercompany loan arrangement so that it is in a form that can be executed**; and
>
> b. b. **Confirming that the proposed terms to do not raise any concerns/issues (particularly in the event of a DASS voluntary administration - such as ipso facto**).
>
> Please let us know if you need any additional information prior to commencing and/or would like to discuss.

(Emphasis added.)

258 For reasons that I will explain later, Mr Ryan's submission that I should find on the evidence that he would not have resolved for DASS to enter into the DOAD if MinterEllison had not provided its advice and that Mr Ryan relied on that advice in resolving for DASS to enter into the DOAD is to be accepted. I accordingly decline to make the sixth finding.

Seventh Finding: The MinterEllison advice was sought to protect the directors of DASS and did not inform their decision-making.

259 ASIC contended that the seventh finding should be made because:

(1) MinterEllison advice was sought at the 11th hour (on 20 December 2021);

(2) Mr Ryan accepted during cross-examination that "on the face of it" there was a "conflict between the interests of the creditors of DASS and the interests of [EPO]" in so far as the intercompany receivable was concerned;

(3) the purpose of the advice being litigation protection is further supported by the fact that the request was for "a brief opinion";

(4) the request was not for advice focussing on the duties of the DASS directors, but contemplated the advice would be for DASS and EPO ("[C]ould you please let us know if you think a standalone DASS opinion is preferable (in the context of a Fork VA scenario occurring) or alternatively whether an opinion covering both E&PO and DASS would be sufficient …").

260 I do not agree.

261 As I have already said, the seeking of advice was not left to the eleventh hour. And the notion that because a client asks for a "brief" advice it is to be concluded that it could only have been for mere "litigation protection" makes no sense. A client may have many very good reasons to insist on a short opinion. Two such (obvious) reasons would include saving money and the convenience of it. A commercial client is, in the ordinary course of things, concerned with the "bottom line" conclusion of a trusted adviser, not what may appear to the commercial person to be the arcane detail of the reasons for it. It seems to me that these parts of the MinterEllison advice say as much as any reasonable commercial person would want to know:

> In our opinion, based on the above Background and subject to the above Assumptions, the directors of DASS should be justified and otherwise acting reasonably if they were to consider that causing DASS to execute the Deed would not involve a breach on their part of their duty to act in the best interests of DASS as long as, at the time of execution, the constitution of DASS included a provision of the type contemplated by s187 of the Corporations Act.
>
> …
>
> In our view, and especially given our instructions that DASS is not insolvent, there may be some merit from the perspective of the directors of DASS for the constitution of DASS to include a provision of the type contemplated by s187, so that the DASS directors are not required to identify a corporate benefit for DASS arising from the Deed. Clearly from the perspective of EP1, there is a corporate benefit to EP1 from the Deed, being to ensure that the Intercompany Debt is properly applied to repay the Relevant Liabilities and for no other purpose. The same holds true from the perspective of E&PO. While there is likely also a corporate benefit from DASS' perspective, given the costs and expenses in connection with DASS' business that are incurred and paid by E&PO and the circumstances surrounding the temporary suspension of the E&PO management fee, it is less clear. The inclusion of a s187 provision therefore should assist in providing some additional protections for the DASS directors.

> In our view, subject to the amendment to the constitution of DASS so as to include a s187 provision, the directors of DASS should be justified and otherwise acting reasonably if they were to take the view that the execution of the Deed by DASS was appropriate and in the best interests of DASS or EP1 as its holding company or both.

262 As Mr Wallis said in his closing address, and with respect I agree:

> Now, to seek to turn that around and say, "Well, Mr Ryan took that as advice to protect himself, and not as advice that it was appropriate to proceed with the DOAD is, in our submission, not an available and fair reading of that advice. The advice, of course, doesn't point out any reason why Mr Ryan should not, or [EPO], really, strictly, but why the amendment should not be made to the constitution. It doesn't identify any potential conflict. It doesn't identify anything at all. And a reasonable person in Mr Ryan's shoes would take from that that it was appropriate to resolve to approve the deed, and additionally, that it was appropriate to amend the constitution as suggested.
>
> And your Honour will note, this is just a good example, that McGrathNicol are copied in to this correspondence, and that feeds into our submissions that Mr Ryan was not only relying on MinterEllison, but also McGrathNicol, who are intimately involved from the very first stage of the preparation of the deed right through to the end, including looking at the advice, and as experienced, trusted, national advisors of high reputation, Mr Ryan was entitled to expect that if there was a problem with him acting in the way that they understood he would act, which was to execute the DOAD, someone would've pointed it out to him, and no one did, and so we ask rhetorically what more could a reasonable person be expected to do than be guided by these types of organisations, and the same applies with Mr Anderson.

263 For those reasons, I decline to make the seventh finding.

Eighth Finding: MinterEllison did not recommend that the directors of DASS amend the constitution.

264 ASIC contended that "[p]roperly construed, the MinterEllison advice did not contain a recommendation that the directors of DASS take steps to amend the constitution. Rather, the advice recognised that the directors of DASS would be personally protected if the constitution of DASS contained a provision of the type referred to in s 187 of the Act. The advice stated that 'it may be appropriate' for the constitution to be amended but did not go so far as recommending that it be amended".

265 That submission is, with respect, quibbling.

266 The advice said that "there may be some merit from the perspective of the directors of DASS for the constitution of DASS to include a provision of the type contemplated by s187" and "[t]he inclusion of a s187 provision therefore should assist in providing some additional protections for the DASS directors". It is not the lawyers' role (in the usual case) to make commercial decisions for the board or to tell the directors what to do, for reasons that are obvious. Whether the "merits" of the "additional protections" were "appropriate" were matters for the directors to form their own view about.

267 For those reasons, I decline to make the eighth finding.

Ninth Finding: Mr Ryan did not consider the interests of DASS's creditors, or alternatively, give due consideration to the interests of DASS's creditors, on 22 December 2021 when resolving to amend DASS's constitution. In fact, the animating or motivating motive of Mr Ryan, to different effect, was to create for himself a legal justification to support entering into the DOAD a few days later.

268 That reads more like a submission than a proposed finding of fact.

269 In any event, Mr Ryan gave evidence in his affidavit that he did consider the interests of DASS's creditors. His evidence on the matter was lengthy and warrants setting out in full:

> In giving authority to affix my signature to the DOAD on behalf of DASS, I noted that at paragraph 4.12 of the Minter Ellison Advice, Mr Oude-Vrielink stated that, although there was a corporate benefit to DASS in entering into the deed of acknowledgement of debt, that benefit was "less clear" than the corporate benefit to EPO. From the time that I received the first draft of Mr Oude-Vrielink's draft advice on 21 December 2021, which contained the same statement, up to when I executed the DOAD on 24 December 2021 on behalf of DASS, I gave careful consideration to whether causing DASS to enter into the DOAD was in the best interests of DASS. In doing so, I took into account what I regarded as the key stakeholders in DASS, namely its creditors and its shareholders, namely EPO and ultimately the Group.
>
> In respect of DASS's creditors, I was mindful that they were all current or former clients of DASS (with the large majority still being clients of DASS). The current clients of DASS were dependent on the ongoing support of EPO and the Group if they were to continue to receive investment advice services from the Group in the future, as the Group intended during and following any voluntary administration of DASS. I was concerned that if DASS did not execute the deed, the Group might reconsider the basis of its commitment to provide the necessary support to DASS so that it could continue to operate during any voluntary administration and that this would be to the detriment of a large majority of DASS's creditors.
>
> I was also conscious that the combined potential claims that would ultimately be payable to DASS's creditors may well be in the hundreds of millions of dollars, which was beyond the means of EP1 to absorb. This meant that even if a voluntary administrator gained access to the approximately $20 million of the intercompany receivable, DASS's creditors would receive only a small proportion of a few cents in the dollar of the total value of their claims, assuming that they participated equally in a distribution of those funds. In this regard, I took into account Mr Anderson having stated to me and the EP1 board that he intended to ensure that the Group contributed an amount that was approximately the same as (and potentially more than) the balance of the intercompany receivable in favour of DASS at that time to a DOCA to be presented to DASS's creditors after any voluntary administration of DASS. I considered that this meant that DASS's creditors would not ultimately be disadvantaged by DASS entering into the DOAD.
>
> In addition to the above matters, I took into account that by causing DASS to enter into the DOAD with the prospect of a voluntary administration and subsequent DOCA, all remaining creditors of DASS would likely get to participate equally in sharing the remaining funds that were available to creditors, in circumstances where early AFCA claimants had up to this point received a disproportionate share of the limited funds by having all of their claims paid out based on what I believed was an inflated loss calculation methodology. I was also conscious that the longer that DASS was subject to the various claims and legal proceedings and associated costs, the more the available insurance pool would be depleted, thereby removing potential funds that would otherwise be available to pay to DASS's creditors.
>
> In respect of DASS's shareholders, I took into account the fact that the Group had provided substantial support to DASS over the previous 2 years, in circumstances where the funds by which that support was provided had come at the expense of the ultimate shareholders of EP1. Based on my various discussions with Mr Anderson referred to above, I had never understood that the Group's support would result in a windfall gain to DASS's creditors if DASS was placed into voluntary administration. Rather, at all times I understood that the Group (via EPO) had allowed the intercompany receivable to be high enough to offset DASS's provisioned liabilities so as to allow DASS to meet its AFSL requirements, for the ongoing benefit of DASS's creditors. I did not

> believe that these steps were intended to result in DASS retaining those funds for the benefit of its creditors if the provisioned liabilities never became payable by DASS, including if insurance ultimately responded to the claims. I did not believe that in these circumstances it would be appropriate for me to permit the prospect of the Group being required to effectively transfer $20 million from the Group to DASS's creditors by allowing the above matters to remain undocumented.
>
> I also took into account the fact that the First and Second Class Actions made allegations against the Group as well as DASS. I considered that it was in the Group's best interests to seek to negotiate an outcome that resulted in all of the claims against DASS and the Group being resolved in a holistic manner and I considered that entering into the DOAD would give the Group a stronger bargaining position to achieve such an outcome.
>
> I sought to balance the above matters in reaching my decision that causing DASS to enter into the DOAD was in the best interests of DASS, including its creditors. In reaching that decision, I was faced with a set of circumstances that I had never faced before and which seemed to me to be unusual. As stated above, I did not have any previous experience in insolvency or corporate restructuring. I sought to take all steps that I considered reasonable in arriving at my decision to cause DASS to enter into the DOAD, including by taking advice from Mr Anderson, Mr Smith and Mr Oude-Vrielink. I had full trust and confidence in all of these individuals and firms and relied on their respective advice that it was reasonable and appropriate in the circumstances for me to cause DASS to enter into the DOAD.
>
> In relation to clause 3.5 of the DOAD, I understood that the forgiveness was intended to operate only where the claims of ASIC and AFCA became due and payable and were then either responded to by insurance or paid via the intercompany receivable by EPO. If there was surplus, that was the circumstance in which the forgiveness would operate. My understanding was that only when the various claims against DASS had been resolved, would EPO be entitled to exercise the automatic forgiveness. That also reflected that EPO had been incurring additional costs for DASS which it had not recovered, over and above the 90 percent figure of the waived management fee for FY21 and the reinstated fee being charged in FY22.

270 I have no reason not to accept that evidence. The highest that ASIC put its case on the proposed ninth finding was that "Mr Ryan was motivated by his 'fear' that, absent an amendment to the DASS' [sic] constitution, the benefit to DASS may not be apparent" and that it was "[f]or that reason that he amended DASS' constitution, while purportedly relying on MinterEllison's advice because '[MinterEllison's advice] raised the concept of making an amendment, and it didn't raise any concerns'". The words in quotation marks are footnoted to transcript references, but the transcript citations do not remotely suggest that Mr Ryan made concessions of the type contended for.

271 It is sufficient to say that I accept the evidence Mr Ryan gave set out above (at [269]). ASIC said that I should approach that evidence "with caution", but I fail to see why.

272 For those reasons, I decline to make the ninth finding.

Tenth Finding: Mr Ryan knew that, if the amendment to the constitution was not attended to, the directors of DASS could not justify that entering into the DOAD was in the interests of DASS.

273 ASIC said little in support of the tenth finding – which involves the proposition that Mr Ryan knew that the DOAD was not justified without the constitutional change – and I decline to make it.

274 It is true that Mr Ryan agreed in cross-examination that he would not have entered into the DOAD without the amendment to the DASS constitution. He also accepted that the reason for amending the

constitution was to provide comfort to him, and perhaps Mr Meaney, to enter into the DOAD a day or two later.

275 But the advice says in terms that in MinterEllison's opinion DASS had derived a corporate benefit from the Intercompany Debt and the temporary suspension of the management fee charged by EPO, but "[d]espite this however, it may be appropriate, before the Deed is entered into, for the constitution of DASS to include a provision of the type provided in s187 of the Corporations Act". That is to say, the DOAD may be in DASS's interests, but there would be no need to identify such an interest if the constitution were amended. Again, if I may quote senior counsel for Mr Ryan in closing, "[t]hat's not the same thing at all as saying that Mr Ryan knew that the deed could not be justified without the change".

Eleventh Finding: The DOAD was not, as a matter of fact, in the interests of DASS.

276 Mr Ryan "accepted that the execution of the DOAD imposed conditions on the circumstances in which DASS could call on the [intercompany receivable] that would not have been imposed if Mr Ryan had not executed the DOAD, and in that sense its execution was favourable to EPO and detrimental to DASS".

277 And, as I have said, I accept his evidence that he thought, including on the basis of the MinterEllison advice, that the DOAD was, as a matter of fact, in the interests of DASS.

278 The relevance of a finding that the DOAD was not "in fact" in the interests of DASS, however, was not explained.

279 For those reasons, I decline to make the eleventh finding.

Twelfth Finding: Continuing Group support for DASS's clients in a voluntary administration was not a consideration Mr Ryan had regard to in determining to execute the DOAD.

280 In relation to the question of ongoing services, Mr Ryan swore in his affidavit as follows:

> In respect of DASS's creditors, I was mindful that they were all current or former clients of DASS (with the large majority still being clients of DASS). The current clients of DASS were dependent on the ongoing support of EPO and the Group if they were to continue to receive investment advice services from the Group in the future, as the Group intended during and following any voluntary administration of DASS. I was concerned that if DASS did not execute the deed, the Group might reconsider the basis of its commitment to provide the necessary support to DASS so that it could continue to operate during any voluntary administration and that this would be to the detriment of a large majority of DASS's creditors.

281 ASIC submitted that I should approach this evidence "cautiously" because, in substance, there was other evidence that the Group wanted to maintain as many clients as possible. But they are not reasons not to accept Mr Ryan's evidence on that point. Of course the Group would at a broad level want to keep as many clients as possible. That ambition is not inconsistent with Mr Ryan's stated concern that "the Group might reconsider its commitment to provide the necessary support to DASS".

282 In relation to the question of Mr Anderson's intention to ensure that the Group contributed an amount to a DOCA that was equal to the intercompany receivable, Mr Ryan further deposed:

> I was also conscious that the combined potential claims that would ultimately be payable to DASS's creditors may well be in the hundreds of millions of dollars, which was beyond the means of EP1 to absorb. This meant that even if a voluntary administrator gained access to the approximately $20 million of the intercompany receivable, DASS's creditors would receive only a small proportion of a few cents in the dollar of the total value of their claims, assuming that they participated equally in a distribution of those funds. In this regard, I took into account Mr Anderson having stated to me and the EP1 board that he intended to ensure that the Group contributed an

> amount that was approximately the same as (and potentially more than) the balance of the intercompany receivable in favour of DASS at that time to a DOCA to be presented to DASS's creditors after any voluntary administration of DASS. I considered that this meant that DASS's creditors would not ultimately be disadvantaged by DASS entering into the DOAD.

283 ASIC sought to rely on Mr Ryan's concession in cross-examination "that he had not discussed whether a contribution would only occur if DASS entered into a deed of acknowledgement with Mr Anderson at any point before the deed of acknowledgement of debt was entered into" and that "Mr Anderson's evidence was also that he had not discussed with Mr Ryan what would occur if DASS didn't enter into the DOAD".

284 It also submitted "[m]ore importantly, [that] there was no certainty at all that the Group would in fact contribute an amount equal to the intercompany receivable, or any amount, to a deed of company arrangement".

285 So much may be accepted, but in my view I have no sufficient basis to disbelieve Mr Ryan's sworn evidence to the effect that continuing Group support for DASS's clients in a voluntary administration was a consideration — among many others — that he had regard to in determining to execute the DOAD.

286 For those reasons, I decline to make the twelfth finding.

287 Now we come to the decisional issues. I will deal with the Thirteenth, Fourteenth, Fifteenth and Sixteenth issues under the one rubric.

Thirteenth Finding: MinterEllison's assumption that the background facts set out in its advice were accurate and complete was incorrect as:

(a) DASS and EPO had not agreed that the Intercompany Debt would accrue on the basis that repayment would only be required if and to the extent the Relevant Liabilities become payable by DASS and are not recoverable from insurance; and

(b) The limitation of the purposes to which the proceeds of repayment of the Intercompany Debt may be applied, being discharged wholly or in part, of the Relevant Liabilities, had not formed part of the negotiations between DASS and EPO when the temporary suspension of the management fee was put in place.

Fourteenth Finding: Mr Ryan understood, on 24 December 2021, that the advice MinterEllison provided him was based on the accuracy and completeness of the background facts. Mr Ryan knew, or at the very least was wilfully blind, that one or two of the assumptions set out in the background facts were inaccurate or incomplete.

Fifteenth Finding: The MinterEllison advice did not assist Mr Ryan in managing the conflict of interest inherent in his position as a director of DASS, director of EPO and the Group Chief Financial Officer.

Sixteenth Finding: Any reliance by Mr Ryan on the MinterEllison advice was unreasonable.

288 I have already dealt with the matters the subject of the thirteenth and fourteenth findings sought. As I have explained, the assumptions in clauses 1.10 and 1.12 of the MinterEllison advice were not incorrect.

289 For the same reasons, I decline to make the thirteenth and fourteenth findings sought.

290 I now turn to the fifteenth and sixteenth findings.

291 The question of Mr Ryan's reliance on the MinterEllison advice is relevant, including because of s 189 of the Act (set out above).

292 ASIC's written closing submissions on each finding was brief, and were as follows:

> … the MinterEllison advice was an advice directed to both the directors of DASS and E&P Ops itself. In managing a conflict between his duties to DASS and E&P Ops, Mr Ryan could not reasonably have relied on legal advice directed to both himself as a director of DASS and to E&P Ops.
>
> More importantly, aside from identifying that directors owe a duty, amongst others, to avoid conflicts of interest, the MinterEllison advice did not address the conflict faced by Mr Ryan at all. The analysis in relation to directors' duties was focused solely on the duty of good faith and best interests.
>
> …
>
> Had Mr Ryan fairly assessed the advice, he would have appreciated and concluded that:
>
> (a) the factual background, particularly the matters in paragraphs 1.10 and 1.12, was in important respects incorrect; and
>
> (b) it did not address, even at a high level, his potential conflict between his duties to DASS and his duties to E&P Ops.
>
> No reasonable director (sophisticated in business and with a law degree) could have considered that an advice prepared for the benefit of E&P Ops could be relied on for that purpose. Furthermore, Mr Ryan ought to have appreciated (and, no doubt, did appreciate) that the advice was a 'brief advice' obtained at the last minute for the purpose of defending any subsequent challenge to the DOAD.
>
> Mr Ryan accepted that 'if there is a non-trivial inaccuracy, it was not reasonable for you to rely on the advice'.

293 Mr Ryan's evidence as to his reliance on MinterEllison was that the firm had been providing legal advice to Evans and Partners since its inception in 2008; he had full trust and confidence in Mr Oude-Vrielink and the firm; he knew Mr Oude-Vrielink to be one of Australia's pre-eminent corporate law and capital markets lawyers; from October 2020, when the firm was first requested to provide advice in connection with Project Fork, it provided legal advice with respect to the Project Fork contingency planning through to the voluntary administration of DASS; and MinterEllison, specifically Mr Oude-Vrielink, were familiar with issues facing the Group and DASS and a trusted advisor to the Group.

294 Mr Ryan also gave evidence that he relied on Mr Oude-Vrielink to provide him with guidance as to how to proceed towards a potential voluntary administration of DASS; that he sought to ensure that his instructions to MinterEllison were accurate and comprehensive; and that he relied on the firm to determine the most appropriate way to document the intercompany receivable.

295 Mr Ryan also gave evidence that when MinterEllison told him that it did not consider it wise for DASS to receive an opinion from the firm and that the preferred approach would be an opinion on the appropriateness of the deed for the benefit of EPO and the existing directors of DASS, Mr Ryan gave evidence that he did not know himself whether it was satisfactory for EPO and the directors of DASS to receive a single advice but that he relied on Mr Oude-Vrielink's legal expertise in proceeding in this way and did not see any reason why Mr Oude-Vrielink's approach would not be satisfactory.

296 Mr Ryan also gave evidence that in reviewing the draft 21 December advice, he reviewed the Background section and formed the view that it was substantially accurate and that the essence of the review that Mr Ryan and the Group undertook was as to the accuracy of the assumptions, not as to the substance of the advice.

297 Mr Ryan also gave evidence that he relied upon and took substantial comfort from Mr Oude-Vrielink's advice as summarised in sections 3 and 4 that the directors of DASS (including Mr Ryan) were justified and otherwise acting reasonably in causing DASS to execute the DOAD, provided that the constitution of DASS was first amended to specifically authorise the directors of DASS to act in the best interests of EPO pursuant to s 187 of the Act; that he did not know the circumstances in which s 187 of the Act could be relied upon by a director of a subsidiary; and that he relied upon Mr Oude-Vrielink's advice that the Group should amend DASS's constitution in the way that he proposed and did not see any reason why the Group should not follow that advice.

298 Mr Ryan also gave evidence that he would not have otherwise signed the DOAD if the constitutional amendment had not occurred; that in voting to pass the resolution approving the draft revised DASS constitution, he relied on the advice of Mr Oude-Vrielink that he had received on 21 December 2021; that he (Mr Ryan) considered that MinterEllison recommended to him for the constitutional amendment to occur; and that he formed this view because the advice raised the concept of making an amendment and did not raise any concerns about that being inappropriate and therefore he considered it to be a recommendation.

299 Mr Ryan gave evidence that he relied on Mr Oude-Vrielink and MinterEllison's advice that it was reasonable and appropriate in the circumstances to cause DASS to enter into the DOAD; on the Monday morning of the week before Christmas 2021, Mr Ryan was uncertain as to whether he would be executing this agreement as a director of DASS; that he needed the firm's advice to satisfy himself that he was not at risk of doing the wrong thing as a director of DASS in signing the DOAD; and that the advice assisted him in determining how to manage the conflict between his personal interest and the interests of DASS.

300 I accept that evidence and I find, as Mr Ryan urged me to find, that he relied on the MinterEllison advice and that he would not have resolved to execute the DOAD if the advice had told him that he would be breaching his director's duties by doing so because it was not in the best interests of DASS. As I said above (and as ASIC accepted), having observed Mr Ryan during his cross-examination, he "presented as a sophisticated, thoughtful and exceptionally well-prepared witness". Nothing he was asked about in the course of that cross-examination caused me to think that any part of his evidence of any matter of substance, including the evidence I have summarised above, was untrue, embellished or unreliable.

301 I also find, as Mr Ryan asked me to find, that:

> (a) he relied on the MinterEllison advice in respect of both resolving to approve the amendment to DASS's constitution and DASS's entry into the DOAD;
>
> (b) MinterEllison was a professional advisor in relation to matters that Mr Ryan believed on reasonable grounds to be within its professional competence, namely the provision of legal advice in the specific context of corporate transactions, solvency issues and compliance with director's duties;
>
> (c) he relied on MinterEllison's advice in good faith and after making an independent assessment of the advice, which involved him reading the advice carefully and satisfying himself that the background assumptions on which it was based were accurate and complete.

302 If it matters, I also find that Mr Ryan, as he in substance deposed, relied on Mr Anderson's experience and expertise in relation to how to deal with corporate insolvency and the information that he provided to Mr Ryan on his plans to deal with the various claims against DASS. I similarly find that Mr Ryan relied on the corporate insolvency and restructuring expertise of McGrathNicol, as he deposed, "to provide [him] with guidance as to how to proceed towards a potential voluntary administration of DASS".

303 That is, for reasons I have already explained, sufficient to dispose of the proceeding and to dismiss it. As I have said, ASIC conducted the proceeding on the basis that if it could not persuade me on the decisional issues, it would fail, as it has. It follows that ASIC has not made out its case that Mr Ryan, in his capacity as a director of DASS, contravened ss 180, 181(1)(a) or 182 as alleged.

304 I am conscious of the fact that I have not dealt with every point argued in closing addresses. But it is precisely because I have answered the sixteen factual issues, and in particular the decisional issues, in the way that I have that renders the consideration of those points unnecessary.

CONCISE STATEMENTS MUST NOT BE USED IN COMPLEX FACTUAL OR LEGAL CASES

305 I should yet again say something about the use of concise statements.

306 Judges of this court have said over and over again that they should not be the vehicle for the hearing of any case that involves complicated, disputed factual and legal issues. See, for example, *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388 at 416–17 [140]–[141] (McKerracher and Colvin JJ); *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* [2023] FCA 1150 at [15]–[17] (Beach J); *Australian Securities and Investments Commission v National Australia Bank Ltd (No 2)* [2023] FCA 1118 at [30]–[39] (Derrington J); *Invisalign Australia Pty Ltd v SmileDirectClub LLC* [2024] FCAFC 46 at [38]–[39] (O'Callaghan, Halley and Button JJ) (concise statements are a most unfortunate way of pleading a case about alleged false, misleading or deceptive representations said to arise from a large body and variety of promotional material); and *Australian Securities and Investments Commission v LGSS Pty Ltd* [2024] FCA 587 at [36]–[39] (O'Callaghan J).

307 This case should have been pleaded in the conventional way, not in the discursive way permitted by concise statements. The lack of the discipline of pleadings meant that the trial of this proceeding took a course that was untethered to precise allegations of fact and their alleged intersection with, or relevance to, the Act, so that a case that was opened as raising three issues was closed on the basis that it raised sixteen. Which is an unsatisfactory state of affairs, to say the least.

DISPOSITION

308 The proceeding is to be dismissed with costs.

I certify that the preceding three hundred and eight (308) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Callaghan.

Associate:

Dated: 6 November 2024